TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 202.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ANN ARBOR RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JANUARY 31, 1899.

(17,287.)

(17,287.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 202.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ANN ARBOR RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Transcript from circuit court of the United States for the western district of Michigan	1	1
Transcript from State court	1	1
Docket entries	1	1
Bill of complaint	1	1
Agreement between the Western Union Telegraph Co. and the Frankfort & South Eastern Railroad Co., September 25, 1890	5	4
Order for injunction	11	9
Injunction	11	9
Sheriff's return	12	10
Subpœna	13	11
Sheriff's return	13	11
Petition for removal	14	12
Bond for removal	15	13
Order for removal	17	14
Answer	18	14

John A. Hertel Co. Printers, W.

	Original.	Print.
Motion to dissolve injunction	21	17
Replication	22	18
Consent to filing cross-bill, &c.	23	19
Order granting leave to file cross-bill, &c.	23	19
Cross-bill	24	20
Agreement between the Western Union Telegraph Co. and the Frankfort and Southeastern R. R. Co., September 25, 1890	27	22
Stipulation as to facts	34	27
Order taking cause under advisement	35	28
Opinion of Severens, J	35	29
Decree	37	30
Appeal and allowance of same	38	30
Assignment of errors	39	32
Bond on appeal	39	32
Citation	41	34
Clerk's certificate	42	34
Appearance for appellant	43	35
Order taking cause under advisement	43	35
Opinion	45	36
Decree	56	44
Assignment of errors	57	45
Bond on appeal	59	45
Citation	60	46
Service of citation	61	47
Clerk's certificate	62	47

1 *Transcript of Record.*

Following and subjoined are copies of the record in the case of—

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant.

In the Circuit Court for the County of Benzie. In Chancery.

Copy of bill of complaint. Filed Oct. 15th, '95.
Copy of injunction. Issued Oct. 15, '95. Filed Oct. 22, '95.
Copy of subpœna. Issued Oct. 15, '95. Filed Oct. 22, '95.
Copy of petition for removal. Filed Nov. 5, '95.
Copy of bond for removal. Filed No. 5, '95.
Copy of order for removal of cause. Filed Nov. 5, '95.

I hereby certify that the following are true copies of the record in the above-entitled cause now remaining on file in my office.

[Seal of the Circuit Court of Benzie County, Michigan.]

Attest: R. B. REYNOLDS,
Register Benzie County, Mich.

STATE OF MICHIGAN:

To the Circuit Court for the County of Benzie. In Chancery.

The Western Union Telegraph Company, a corporation organized and existing under the laws of the State of New York, and a citizen of the said State of New York, brings this its bill of complaint against the Ann Arbor Railroad Company, a corporation organized and existing under the laws of the State of Michigan and a citizen of said State of Michigan, and thereupon complaining says:

2 1st. That on the (25) twenty-fifth day of September, 1890, the Frankfort and South Eastern Railroad Company, a corporation organized under the laws of the State of Michigan, owned and operated a line of railway from Frankfort in the State of Michigan to the western terminus of the Toledo, Ann Arbor and North Michigan railroad near Copemish in said State of Michigan; that on said last-mentioned day, complainant entered into a contract with said Frankfort and South Eastern Railroad Company for the construction and maintenance of a telegraph line along the entire length of its said railroad, a copy of which contract is attached to this bill and made a part hereof.

2d. That in pursuance of said contract and in May, June and July, 1891, complainant built the telegraph lines provided for therein. One wire was erected for the joint use of the railroad company and complainant. A loop wire to Frankfort and back was put on the same poles for the exclusive use of complainant. From that time until October 1, 1895, both wires have been in constant use: the first by the railroad company and your orator, the last by com-

plainant exclusively. These wires constitute the only means of telegraph communication with Benzonia and Frankfort. They run from a place now called Tompsonville to Frankfort. At Tompsonville they connect with the telegraph line of complainant running north from Grand Rapids on the Chicago and West Michigan railroad.

3d. Complainant alleges on information and belief that some time in May, 1892, the said railroad of the Frankfort and South Eastern Railroad Company was sold and transferred to the Toledo, Ann Arbor and North Michigan Railway Company, a corporation organized and existing under the laws of the State of Michigan. That afterwards said last-mentioned company mortgaged their entire railroad to the Farmers' Loan and Trust Company as trustee; that said mortgage being in default a bill was filed to foreclose it September 4, 1893, in the circuit court *for* the United States for the eastern district of Michigan. Soon after Wellington R. Burt was appointed receiver. The whole road was sold under the order of the court and conveyed to said Ann Arbor Railroad Company; and said sale and conveyance have been confirmed by the order of said court. Said last-mentioned company now claims to be in possession and operating said road from Thompsonville to Frankfort, formerly known as the Frankfort and South Eastern railroad.

Your orator was not a party to said foreclosure suit.

3 4th. That said Wellington R. Burt is the president of said Ann Arbor Railroad Company, and one H. W. Ashley, of Toledo, Ohio, is its general manager. That both of these parties have long been familiar with the terms of the said contract of complainant with the Frankfort and South Eastern Railroad Company, and with the rights of complainant in the wires built on the line of said railroad, and your orator avers on information and belief, that said Ann Arbor Railroad Company purchased said road with a full knowledge of your orator's rights therein.

5th. Your orator avers that said Ann Arbor Railroad Company, acting through said Ashley, claims not to be bound by said contract made with the Frankfort and South Eastern Railroad Company, and has given your orator written notice to this effect.

6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster General its acceptance of the provisions of the act of the United States, passed July 24, 1866.

7th. It avers that the provisions of the contract with said Frankfort and South Eastern Railroad Company are binding on said Ann Arbor Company, and that independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern railroad under the provisions of the statute of the United States.

8th. On or about the first day of October, 1895, said Ann Arbor Railroad Company under the direction of its manager, said H. W. Ashley, took possession of complainant's said wires between Thompsonville and Frankfort, and cut off their connection with its other wires and deprived your orator of all telegraphic connections

with Frankfort and Benzonia. At the same time said company continued to use said wires exclusively for its own business.

9th. The value of said telegraph lines of which your orator is thus deprived is, at least, the sum of three thousand ($3,000) dollars; and the damages arising through the loss of business which will occur therefrom is large, but is incapable of accurate calculation.

10th. That on the 14th day of October, 1895, your orator reconnected the said telegraph lines running from Thompsonville to Frankfort, and so again opened telegraphic communication with the latter place and is now in full possession and use of said lines. The statements in this paragraph are alleged on information and belief.

4 11th. Your orator is justly apprehensive, that unless restrained by the injunction of this court, said Ann Arbor Railroad Company will again seize possession of said telegraphic lines and deprive your orator of their use.

To the end that said defendant, The Ann Arbor Railroad Company may answer this bill, but not under oath, answer under oath being hereby expressly waived, and that an injunction both preliminary and final may be issued out of and under the seal of this court, commanding the said Ann Arbor Railroad Company and all its officers and agents to absolutely desist and refrain from in any way interfering with the rights of complainant as alleged in this bill in the telegraph wires and poles running from Thompsonville to Frankfort, or its possession of the same, and that said defendant allow said complainant to reconnect said wires to its main line on the Chicago and West Michigan railroad, and to use said wires for its telegraph business in the same way as it was accustomed to use them before its rights were disturbed by said defendant, and that defendant be required to carry out said contract in good faith and for such other and further or different relief, or both, as may be agreeable to equity and good conscience.

Your orator asks that a subpœna in usual form be issued out of this court, commanding said Ann Arbor Railroad Company, to be and appear before this court on a day named and to answer to this bill of complaint.

THE WESTERN UNION TELEGRAPH COMPANY,
C. A. KENT,
Solicitor and of Counsel for Complainant.

STATE OF MICHIGAN, }
Wayne County. }

On this 14th day of October, A. D. 1895, personally appeared before me a notary public in and for said county Cornelius Corbett well known to me and made oath that he is district superintendent in said Western Union Telegraph Co., for certain States including Michigan, that he has heard read the foregoing bill signed by said company and knows the contents thereof, that the statements of such are true of his own knowledge except as to matters stated on

information and belief and these he believes to be true and that he makes this affidavit as the duly authorized agent of said telegraph company.

KITT B. O'MARA,
Notary Public, Wayne County, Michigan.

5 Copy.

This agreement, made and entered into this twenty-fifth day of September, 1890, by and between the Western Union Telegraph Company, of the first part, and the Frankfort and South Eastern Railroad Company, of the second part, hereinafter designated, respectively, as the telegraph company and the railroad company.

Witnesseth, that whereas, the railroad company owns and operates a railroad between Frankfort and the western terminus of the Toledo, Ann Arbor and Northern Michigan railroad near Copemish, in the State of Michigan, along which railroad and any extensions or branches thereof it is proposed that a telegraph line shall be constructed, maintained and operated.

Now, therefore, for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

First. The railroad company agrees to furnish and distribute for the telegraph company, free of cost, along the railroad company's line of railroad between Frankfort and said terminus near Copemish, and along all extensions and branches thereof, as fast as the same shall be completed and in operation, cedar poles, well proportioned and properly peeled, not less than thirty (30) poles to the mile, and at least twenty-five (25) feet in length and six (6) inches in diameter, at the small end.

The railroad company also agrees to furnish, free of cost, to the telegraph company, all the labor to dig holes and set said poles in the ground and to place the wires and insulators thereon, under the direction of a foreman to be furnished by the telegraph company.

And the railroad company agrees, at its own expense, to maintain said poles and the wire or wires thereon, in good order and repair, and to reconstruct said poles and wire or wires when required by the telegraph company, wire and insulators for such repair and reconstruction being furnished by the telegraph company at its expense, as hereinafter provided, and the poles and labor for such repairs and reconstruction to be furnished by the railroad company, free of charge, to the telegraph company.

The telegraph company agrees to furnish, at its own expense, a foreman, who shall oversee and direct the work of construction and reconstruction herein provided for. It is understood and agreed that the railroad company shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the telegraph company has or may have along said railroad for

6 its business, that the railroad company does in the maintenance and repair of the wire or wires used exclusively by it.

It is further understood and agreed that the telegraph company's poles now standing along or near the railroad company's railroad, along Crystal Lake beach, may be used by the railroad company until the same require to be replaced, when the railroad company shall furnish and erect new poles and transfer the wire or wires thereto.

Second. The telegraph company agrees to furnish, at its expense, at some station on the line of said railroad, number nine galvanized wire and insulators for the construction of a telegraph line of one wire along said railroad between Frankfort and said terminus near Copemish, and along all extensions and branches of said railroad as fast as the same shall be completed and in operation, and the telegraph company further agrees to furnish wire and insulators for the maintenance, repair and reconstruction of its line and its wires along said railroad and extensions and branches thereof, and will deliver the same as above free of cost to the railroad company as they may be needed. The telegraph company will also furnish the use of its main batteries in its main offices for the operation of the wires herein provided for. The railroad company agrees to furnish free of charge in its station-houses, suitable space for and attention to main batteries when required by the telegraph company.

Third. The telegraph company agrees to set apart the first wire erected along said railroad and the first wire erected along extensions and branches thereof, for the joint use of the parties hereto in the transmission of railroad and commercial telegraph business, it being agreed that the railroad company's messages of an important character, directing the movement of trains, shall have precedence over said joint wire.

Whenever the railroad business of the railroad company requires the exclusive use of said joint wire, the telegraph company on receiving ninety (90) days' written notice, agrees to furnish the material for the construction of a wire for commercial business, the railroad company agreeing to furnish at its expense the labor for, and to pay the expense of erecting the same, under the direction of a foreman to be furnished by the telegraph company.

After the erection of said second wire, the first wire shall be set apart for the railroad company's railroad business exclusively, and for such commercial business as can be done thereon without interfering with said railroad business. In case of the interruption of either one of said two wires, the business of both parties hereto shall, as far as practicable, be done over the working wire, important railroad messages directing the movement of trains having precedence.

7

Fourth. Either party to this agreement may establish and maintain telegraph stations at such places on said railroad as it may deem necessary and at all such stations as the railroad company may establish, the telegraph company agrees to supply Morse instruments and local batteries, and blank forms and stationery for commercial business.

At all telegraph stations of the railroad company, it shall furnish

operators at its own expense; and its operators and other employés acting as agents of the telegraph company, shall receive, transmit and deliver exclusively for the telegraph company party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company thereon, and shall render to the telegraph company exclusively, monthly statements of such business and full accounts of all receipts therefrom, and the railroad company agrees to pay all of such receipts to the telegraph company in such manner and at such times as it may direct. And said operators and other employés shall not, without the consent of the telegraph company, transmit over said telegraph line any free messages except those herein provided for, and concerning all telegraph business, whether paid or free, shall conform to all rules, regulations and orders of the telegraph company applicable thereto. No employé of the railroad company shall while in its service be employed in the transaction of commercial or public business by or for any party other than the telegraph company party hereto; and the telegraph company shall have the exclusive right to the occupancy of the railroad company's depots and station-houses for commercial or public business as against any other party.

Fifth. All messages of the officers and agents of the railroad company, pertaining to its railroad business, shall be transmitted free of charge by railroad operators on the wires set apart for said business between all telegraph stations on the line of said railroad.

The telegraph company agrees to issue to such officers of the railroad company, as may be designated by the president or general superintendent thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the railroad company's railroad covered by this agreement originating at and destined to points on the telegraph company's lines
8 in the United States beyond or off the lines of said railroad, to an amount not exceeding two hundred and fifty dollars ($250.00) per annum for the first twenty-five (25) miles of railroad constructed by the railroad company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and six dollars ($6.00) per annum additional for each additional mile of railroad so constructed, owned, leased or controlled by the railroad company and occupied as aforesaid.

The tolls on all other messages to and from points beyond or off the line of said railroad shall be calculated at the regular commercial day rates of the telegraph company between the points at which such messages originate and the points to which they may be destined.

And the railroad company agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the railroad company's

railroad covered by this agreement, and shall not be extended to any messages to be transmitted by cable, nor messages ordering sleeping car, parlor car or steamer berths, merchandise or accommodations for customers of the railroad company, the tolls of which messages shall be paid by such customers.

Sixth. The railroad company agrees to transport free of charge over its railroad upon application of the superintendent or other officer of the telegraph company all persons in the employ of the telegraph company when traveling on the business of said company; and also to transport and distribute free of charge along the line of its railroad all poles and other material and supplies for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by this agreement, and of such additional wires and lines of poles and wires as may be erected under the provisions of this agreement and also all materials and supplies for the establishment, maintenance and operation of the offices of each of the parties hereto at places along and adjacent to or at the termini of said railroad.

Seventh. If the telegraph company elects to establish an independent office at a station of the railroad company, the railroad company shall furnish office room light and fuel free of charge in such station, and if at such station one person can attend to the telegraph business of both companies, the agent of the telegraph company, acting for and as the agent of the railroad company in the premises, shall do such business of the railroad company without charge.

Whenever the telegraph business of both companies at any such office becomes so large that more than one operator is needed to attend to it, then the railroad company shall employ and pay its own operator.

Eighth. The railroad company, so far as it legally may hereby grants and agrees to assure to the telegraph company, the exclusive right of way on along and under the line, lands and bridges of the railroad company, and any extensions and branches thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to put up or construct or cause to be put up or constructed from time to time such additional lines of poles and wires and underground or other lines as the telegraph company may deem expedient, and the railroad company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the railroad company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other lines in competition with the lines of the telegraph company party hereto, except at and for the railroad company's regular local rates, nor will it furnish for any competing lines any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations.

Provided always that in protecting and defending the exclusive

grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, but shall indemnify and save harmless the railroad company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

Ninth. It is a condition of this contract that the railroad company is not to be responsible for, and the telegraph company hereby covenants and agrees to save the railroad company harmless and indemnify it against any loss or damage of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company while being carried free over said railroad under this agreement, and from any neglect or failure in the transmission or delivery of messages for any person doing business with the telegraph company, and on account of any other public telegraph business; and the telegraph company shall not be responsible for, and the railroad company agrees to indemnify and save harmless the telegraph company against any loss or damages of any kind arising from or on account of any error, failure, delay or fault in the transmission or delivery of any and all messages sent by or for the railroad company under this agreement.

Tenth. The railroad company shall have the right to the free use of any telegraphic patent rights or new discoveries or inventions that the telegraph company now owns and uses in its general telegraph business or which it may hereafter own and use as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroad as provided herein.

Eleventh. It is mutually understood and agreed that the telegraph line, poles, wires and fixtures covered by this contract shall be the property of the telegraph company and shall form part of its general telegraph system, and shall be controlled and regulated by the telegraph company, which shall fix and determine all tariffs for the transmission of messages, and all connections with other lines and interests.

Twelfth. The provisions of this agreement shall extend to all railroads now owned, leased, controlled or operated, and to all railroads hereafter owned, leased, controlled or operated, by the railroad company or by any company or corporation, in which the railroad company *or by any company or corporation, in which the railroad company* may own a majority of the stock, or whose action it may be able to control by ownership of stock or otherwise and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from the twenty-fifth day of September, 1890, and shall continue after the close of said term until the expiration of one (1) year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such differences shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by

the two other- chosen, and the decision of such arbitrators, or a majority thereof shall be final and conclusive.

In witness whereof the parties to these presents have caused
11 the names of their proper officers to be hereunto subscribed, and their corporate seals to be attached the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY,

[SEAL.] (Signed) By JOHN VAN HORNE, *Vice-President.*

(Signed) A. R. BREMER, *Secretary.*

THE FRANKFORT AND SOUTH EASTERN RAILROAD COMPANY,

[SEAL.] (Signed) By HENRY DAY, *President.*

(Signed) D. B. BUTLER, *Secretary.*

STATE OF MICHIGAN:

The Circuit Court for the County of Benzie. In Chancery.

Upon reading and filing the within bill of complaint it is hereby ordered that an injunction issue as prayed in the within bill until the hearing upon the order to show cause this day made or until the further order of the said court.

FRED H. ALDRICH,
Circuit Judge.

In the circuit court for the count of Benzie. In chancery. The Western Union Telegraph Company *vs.* The Ann Arbor Railroad Company. Filed Oct. 15, 1895. R. B. Reynolds, register. C. A. Kent, sol. for compl't.

STATE OF MICHIGAN:

In the Circuit Court for the County of Benzie. In Chancery.

In the name of the People of the State of Michigan to the Ann Arbor Railroad Company, a corporation organized and existing under the laws of Michigan, and to counselors, attorneys, solicitors, and agents and each and every of them, Greeting:

Whereas, it has been represented to us in the circuit court for the county of Benzie in chancery, on the part of The Western Union Telegraph Company, a corporation organized and existing under the laws of the State of New York, complainant, that it has lately exhibited its bill of complaint against you, the said Ann Arbor Railroad Company, defendant, to be relieved, touching the matters therein complained of; in which bill it is stated amongst other things, that you are combining and confederating with others to injure the said complainant touching the matters set forth in the

said bill, and that your actings and doings in the premises
12 are contrary to equity and good conscience, we therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you the said Ann Arbor Railroad Company and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from interfering with the rights of complainant in the telegraph wires and poles running from Thompsonville to Frankfort both in the State of Michigan, along the line of what was formerly the Frankfort and South Eastern Railroad Company or with its possession of the same and that you also desist and refrain from preventing complainant from reconnecting said telegraph lines with its main line running north from Grand Rapids on the Chicago and West Michigan railroad and from the full use of said wires for its telegraph business in the same way it was accustomed to use them before its rights were disturbed by defendant, said rights arising under a contract between complainant and the Frankfort and South Eastern Railroad Company until the further orders of this court.

Witness the Honorable Fred H. Aldrich, circuit judge, and the seal of said circuit of Benzie this 15th day of
[SEAL.] October in the year one thousand eight hundred and ninety-five.

R. B. REYNOLDS, *Register.*

C. A. KENT,
Solicitor for Compl't.

STATE OF MICHIGAN, } ss:
County of Benzie, }

I hereby certify and return that on the 15th day of October, A. D. 1895, at the township of Gilmore I served the within writ of injunction on L. E. Vorce, agent of the Ann Arbor Railroad Company at South Frankfort, Benzie county, Michigan, also on Oct. 16th, at Thompsonville, Mich., I served the within injunction on Thomas McGrail, agent of The Ann Arbor Railroad Company at Thompsonville, Mich., the defendant named therein, personally by then and there showing to the said Ann Arbor Railroad Company by their agents L. E. Vorce and McQuail the said injunction, with the seal impressed thereon and delivered to them true copies thereof.

CHARLES DOBSON,
Sheriff of said County.

My fees, $3.25.

The circuit court for the county of Benzie. In chancery.
13 The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Company, defendant. Injunction. Filed this 22nd day of October, 1895. R. B. Reynolds, register. C. A. Kent, solicitor for compl't.

STATE OF MICHIGAN, *ss:*

The Circuit Court for the County of Benzie. In Chancery.

[SEAL.] In the name of the People of the State of Michigan to the Ann Arbor Railroad Company, Greeting:

You are hereby notified that a bill of complaint has been filed against you in the circuit court for the county of Benzie in chancery, by The Western Union Telegraph Company, as complainant, and that if you desire to defend the same you are required to have your appearance entered with the register of said court at his office, in the town of Frankfort in said county, in person or by solicitor, within twenty days after the 29th day of October, in the year 1895, which is the return day of this writ. Hereof fail not under the penalty of having said bill taken as confessed against you.

Witness, the Hon. Fred. H. Aldrich, circuit judge, at Frankfort, this 15th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

R. B. REYNOLDS, *Register.*

C. A. KENT,
Solicitor for Complainant.

Underwriting.—A personal decree is sought against the defendant, The Ann Arbor Railroad Company, and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants.

C. A. KENT,
Solicitor for Complainant.

STATE OF MICHIGAN, }
County of Benzie, } *ss:*

I hereby certify and return that, on the 15th day of October, A. D. 1895, at South Frankfort, I served the within subpœna, personally, on L. E. Vorce, agent of Ann Arbor Railroad Co. I hereby certify and return that on the 16th day of October, A. D. 1895, at Thompsonville I served the within subpœna personally on McCrail, agent of the Ann Arbor Railroad Co. I hereby certify and return that on the 16th day of October, A. D. 1895, at Thompsonville, I served
14 the within subpœna personally on W. F. Bradley, agent of The Ann Arbor Railroad Co., defendant named in said subpœna, by then and there, at the place and on the date above mentioned, delivering to said above-named defendants a true copy of the said subpœna, inscribed "copy" and subscribed —— ——, complainant's solicitor, and by showing at the same time to the said above-named defendant the said subpœna, with the seal of the court impressed thereon, on which copy so served was true copy of the underwriting on the said subpœna.

CHARLES DOBSON, *Sheriff.*

My fees, service, $3.25.

The circuit court for the county of Benzie. In chancery. The Western Union Telegraph Company, complainant, *vs.* The Ann

Arbor Railroad Company, defendant. Subpœna. Returned and filed Oct. 22, A. D. 1895. R. B. Reynolds, register. C. A. Kent, solicitor for complainants.

In the Circuit Court for the County of Benzie, State of Michigan.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Defendant.	In Chancery. Petition for Removal.

To the honorable the circuit court for the county of Benzie, State of Michigan:

Your petitioner, The Ann Arbor Railroad Company, defendant herein, respectfully shows to the court that it is a corporation, duly organized under the laws of the State of Michigan, and is a citizen of the said State of Michigan; that the said complainant, The Western Union Telegraph Company is a corporation duly organized under the laws of the State of New York and is a citizen of said State of New York.

Your petitioner further shows to the court that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of interest and costs the sum and value of two thousand dollars ($2,000); that this suit is one arising under the Constitution and laws of the United States, and especially under the act of Congress of July 24th, 1866, now contained in section 5263 of the Revised Statutes of the United States and the amendments thereto.

15 Your petitioner offers herein a good and sufficient surety for entering in the circuit court of the United States for the western district of Michigan, southern division, on the first day of its next session, a copy of the record of this suit and for paying all costs that may be awarded by said circuit court if this court shall hold that this suit was wrongfully or improperly removed thereto.

And this petitioner prays *that* honorable court to proceed no further herein except to make an order to remove said cause, accept said surety and bond, and cause the record herein to be removed into the said circuit court of the United States for the western district of Michigan, southern division. And petitioner will ever pray, etc.

THE ANN ARBOR RAILROAD COMPANY,
By ALEXANDER L. SMITH, *Its Solicitor.*

THE STATE OF OHIO, } ss:
Lucas County, }

Alexander L. Smith being first duly sworn says that he is solicitor for the said defendant, The Ann Arbor Railroad Company; that the said defendant is a corporation; that the matters and things set forth in the foregoing petition are true.

ALEXANDER L. SMITH.

Sworn to before me and in my presence subscribed this 30th day of October, 1895.

W. G. DENMAN,
Notary Public, Lucas Co., Ohio.

225. Circuit court of Benzie county. The Western Union Telegraph Co. *vs.* The Ann Arbor Railroad Co. Petition for removal. Filed Nov. 5, 1895. R. B. Reynolds, reg. A. L. Smith, att'y for def't.

In the Circuit Court for the County of Benzie, State of Michigan.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Defendant. } Bond for Removal.

Know all men by these presents that we, the Ann Arbor
16 Railroad Company, as principal and W. R. Burt as sureties are held and firmly bound unto the Western Union Telegraph Company in the penal sum of five hundred dollars ($500.00) to the payment whereof, well and truly to be made unto the said The Western Union Telegraph Company, its successors and assigns, we do hereby bind ourselves, our successors, heirs and administrators.

Upon condition nevertheless; that whereas, the said The Ann Arbor Railroad Company has filed its petition in the circuit court of the county of Benzie, State of Michigan, for the removal of the cause pending in said court, wherein The Western Union Telegraph Company is complainant, and the said The Ann Arbor Railroad Company is defendant, to the circuit court of the United States for the western district of Michigan, southern division.

Now, if the said The Ann Arbor Railroad Company shall enter into the said circuit court of the United States on the first day of its next session a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, the said The Ann Arbor Railroad Company as principal and W. R. Burt as sureties have hereunto set our hands and seals this 31st day of October, 1895.

THE ANN ARBOR RAILROAD COMPANY,
By W. R. BURT, *President.*
THE ANN ARBOR R. R. CO.
W. R. BURT.

I hereby approve the above and foregoing bond and the surety therein.

FRED H. ALDRICH,
Circuit Judge.

225. Circuit court of Benzie Co. The Western Union Telegraph Co. *vs.* The Ann Arbor Railroad Co. Bond for removal. Filed Nov. 5, 1895. R. B. Reynolds, reg. Alex. L. Smith, sol. for def't.

17 STATE OF MICHIGAN:

Circuit Court of Benzie County.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Defendant. } Order for Removal.

This day came the defendant The Ann Arbor Railroad Company and presented to the court its petition herein for an order for the removal of this cause to the United States circuit court, western district of Michigan, southern division, together with bond in the sum of five hundred dollars ($500) conditioned according to law, for the removal of said cause, signed by the said defendant as principal and Wellington R. Burt, as surety, and it appearing that said petition is in proper form and that said surety and bond are sufficient, it is ordered that said surety and bond be and the same are hereby accepted. That no further proceedings be had in this court in this cause, and that the same be removed unto the said circuit court of the United States in and for the western district of Michigan, southern division.

FRED H. ALDRICH,
Circuit Judge.

225. State of Michigan. Circuit court, Benzie county. The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Co., defendant. Order for removal of cause. Filed Nov. 5, 1895. R. B. Reynolds, reg. Alexander L. Smith, solicitor.

No. 1198. The circuit court of the United States for the western district of Michigan, southern division. In equity. State of Michigan. Circuit court for the county of Benzie. In chancery. The Western Union Telegraph Company *vs.* The Ann Arbor Railroad Company. Copy of record. Filed Nov. 18, 1895. Chas. L. Fitch, clerk.

18 In the Circuit Court of the United States, Western District of Michigan, Southern Division.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Defendant. } No. —.

Answer.

Now comes the defendant, The Ann Arbor Railroad Company, a corporation organized and existing under the laws of the State of

Michigan and for its answer to the bill of complaint herein, or to so much and such parts thereof as it is advised it is necessary for it to respond unto, says:

First. That it admits the truth of the allegations contained in the first and second paragraphs of the bill of complaint.

Second. As to the matters and things set forth in the third paragraph of the bill of complaint this respondent alleges the facts to be as follows: That on or about the first day of March, 1889, the said The Frankfort & Southeastern Railroad Company executed a mortgage upon all of its property and assets of every kind and description, whether then owned or thereafter to be acquired by said company, to Henry Day and Albert C. Hall as trustees which mortgage was thereupon, to wit, on the 11th day of May, 1889, duly recorded in the county of Benzie, in which said property was for the most part located, and as defendant believes, also in the counties of Manistee and Wexford through or into which said line of railroad extended, and became and continued thereafter to be a first lien upon all the property and assets of said company of every kind and description. That said mortgage was made to secure the issue of bonds of said company to the amount of $235,000.00, which were duly issued and sold to divers and sundry purchasers as defendant is informed and believes at or about the time of the execution and recording of said mortgage. That at the time of the purchasing of the said railroad of the Frankfort and Southeastern Railroad Company by said The Toledo, Ann Arbor & North Michigan Railway Company, which took place in the month of May, 1892, said mortgage was an outstanding valid lien securing the whole of the said issue of bonds upon the property of said The Frankfort & Southeastern Railroad Company so transferred to said The Toledo,
19 Ann Arbor & North Michigan Railway Company. That as a part of the consideration of the said purchase and transfer, said The Toledo, Ann Arbor & North Michigan Railway Company agreed and undertook to pay the indebtedness secured by said mortgage. That by said transfer and purchase the railroad and all the property of said Frankfort & Southeastern Railroad Company became the property of said The Toledo, Ann Arbor & North Michigan Railway Company.

This respondent further says that prior to the purchase of said property of the Frankfort & Southeastern Railroad Company, to wit, in the month of January, 1890, the said Toledo, Ann Arbor & North Michigan Railway Company had executed to the Farmers' Loan & Trust Company a consolidated mortgage upon all the property of said company then owned or thereafter to be acquired, being as respondent supposes the mortgage which is set up in the third paragraph of the bill of complaint. That said mortgage was made to secure an issue of bonds, a large number of which, to wit, about one million three hundred thousand dollars in amount were outstanding at the time of said purchase and transfer. That thereupon by virtue of the terms of said mortgage, the same became a lien upon all the property of said The Frankfort & Southeastern

Railroad Company, subject however to the prior lien of said mortgage to said Hall and Day, as trustees.

This respondent further says that subsequently, to wit, on or about the month of January, A. D. 1894, the indebtedness secured by said mortgage of the Frankfort & Southeastern Railroad Company became and was due, and the same being unpaid a suit was begun by the trustees named in said mortgage, in this court to foreclose the same, and cause the property to be sold for the satisfaction thereof. That such proceedings were had therein as that all the parties interested were made parties to said suit, and thereupon a decree was rendered for the sale of the said property for the satisfaction of said indebtedness, and said property was sold on or about the first day of June, 1895, for an amount largely insufficient to satisfy the said debt, to Albert C. Hall and George Lord Day, and thereupon a deed was made by order of said court to said purchasers for the same. And thereupon said purchasers caused to be incorporated under the laws of the State of Michigan, a certain corporation named the Escanaba, Frankfort & Southeastern Railroad Company, to which said property was duly conveyed and transferred by said purchasers, and thereupon the said The Escanaba, Frankfort & Southeastern railroad duly transferred in accordance with law, all its property and assets to this respondent, who is now the owner of the same. By virtue of the premises this respondent alleges that it became subrogated to and succeeded to all the rights of the mortgagees in said mortgage executed by said Frankfort & Southeastern Railroad Company.

This respondent says it is true that said consolidated mortgage was foreclosed by appropriate proceedings in this court and the property covered thereby was sold under a decree entered in said foreclosure proceedings subject to the lien of the mortgage executed by the Frankfort & Southeastern Railroad Company as aforesaid, so far as said lien extended, and that the purchaser at said judicial sale has transferred and conveyed to this respondent all the property and assets so by him purchased as aforesaid. That by virtue of the premises this respondent has become subrogated to and succeeded to all the rights of the mortgagee under said consolidated mortgage. It is true that complainant was not a party to either of said foreclosure suits.

Third. This respondent admits the truth of the allegations of the fourth, fifth and sixth paragraphs of the bill of complaint.

Fourth. This respondent denies the allegations contained in the seventh paragraph of the bill of complaint.

Fifth. As to the allegations of the eighth paragraph of the bill of complaint, this respondent says that the same are substantially true.

Sixth. As to the allegations of the ninth paragraph of the bill this respondent says that it denies that the value of the telegraph lines is the sum of at least three thousand dollars ($3,000) and further denies that the damages arising from the loss to the business will be as large as therein alleged.

Seventh. As to the allegations contained in the tenth paragraph of the bill this respondent says that the facts are as follows: On

Monday, October 14, 1895, the complainant attempted to reconstruct their said telegraph lines running from Thompsonville to Frankfort, but *were* prevented from so doing by this respondent. That on Tuesday, October 15, 1895, said plaintiff obtained the temporary writ of injunction herein allowed by the circuit court of Benzie county and thereupon under cover and protection of the said injunction on Wednesday, October 16, 1895, the said complainant took possession of the poles and wires in question and restored them to the situation in which they originally were, and so ob-
21 tained possession of the property under said process of injunction; that since said last-named date the complainant has been in full possession and enjoyment of the property and privileges in question.

Wherefore this respondent denies that said complainant is entitled to the relief herein prayed for, or any part thereof, or to any relief whatever in this cause, and prays the same advantage of this answer as if it had pleaded or demurred to the said bill of complaint, and prays to be dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE ANN ARBOR RAILROAD COMPANY,
By ALEX. L. SMITH, *Its Solicitor.*

STATE OF OHIO, } ss:
Lucas County, }

Henry W. Ashley, being first duly sworn, makes oath and says that he is the general manager of The Ann Arbor Railroad Company, the defendant herein, and that the matters and things set forth in its foregoing answer are true.

HENRY W. ASHLEY.

Sworn to before me and subscribed in my presence this 18th day of November, A. D. 1895.

[NOTARIAL SEAL.]

W. G. DENMAN,
Notary Public, Lucas County, Ohio.

No. 1198. Circuit court of the United States, western district of Michigan, southern division. The Western Union Telegraph Co., complainant, *vs.* The Ann Arbor Railroad Co., defendant. Answer. Filed Nov. 20, 1895. Chas. L. Fitch, clerk. Alexander L. Smith, att'y.

In the United States Circuit Court, Western District of Michigan, Southern Division.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Defendant. } Motion.

Now comes the defendant, The Ann Arbor Railroad Company and moves the court to dissolve the injunction herein allowed and

shows for cause that upon the facts as the same appear in the
22 pleadings said injunction was allowed without warrant either in law or equity, and that it would be unjust and inequitable to continue the same.

THE ANN ARBOR RAILROAD COMPANY,
By ALEXANDER L. SMITH,
Its Solicitor.

No. 1198. In the United States circuit court, western district of Michigan, southern division. The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Co., defendant. Motion to dissolve injunction. Filed Nov. 20, 1895. Chas. L. Fitch, clerk. Alexander L. Smith, att'y.

The United States Circuit Court for the Western District of Michigan, Southern Division. In Chancery.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant.

The replication of The Western Union Telegraph Company, complainant, to the answer of The Ann Arbor Railroad Company, defendant.

This repliant, saving and reserving to itself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answer for replication thereunto, say- that it will aver, maintain and prove the bill of complaint to be true, certain and sufficient in the law, to be answered unto; and that the said answer is uncertain, untrue and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatever, in the said answer contained, material or effectual in the law, to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray- as in and by its said bill it has already prayed.

C. A. KENT,
Solicitor for Complainant.

No. 1198. The United States circuit court for the western
23 district of Michigan, southern division. In chancery. The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Company, defendant. Replication. Filed this 26th day of November, 1895. Chas. L. Fitch, clerk. C. A. Kent, solicitor for complainant.

United States Circuit Court, Western District of Michigan, Southern Division.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant. } Stipulation.

The complainant in the above-entitled cause, The Western Union Telegraph Company, hereby consents to the filing of the cross-bill herein against it, by the Ann Arbor Railroad Company, and waives the issue and service of process of subpœna thereon, acknowledges service of a copy of said cross-bill and enters it- appearance to the same.

Compl't may demur to said cross-bill without affidavit or certificate of counsel as provided by rules, or it may answer.

C. A. KENT,
Compl't's Solicitor.

No. 1198. The U. S. cir't ct., west. dist. of Michigan, southern division. The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Co., defendant. Stipulation for filing cross-bill. Filed Apr. 13, 1896. Chas. L. Fitch, clerk. Alexander L. Smith, att'y.

March Term, A. D. 1896.

MONDAY, *April* 13, 1896.

The court met pursuant to adjournment.

Present: The Honorable Henry H. Swan, district judge.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant. } No. 1198.

By consent of parties and for good cause shown, it is ordered that the defendant in the above-entitled cause, The Ann Arbor Railroad Company, have leave to file its cross-bill herein instanter against said complainant, The Western Union Telegraph Company, and thereupon said cross-bill having been filed, came the Western Union Telegraph Company and waived the issue and service of process of subpœna on the same, as prayed for therein and acknowledged service of a copy of the same and entered its appearance thereto.

And by consent of both parties said cause is continued to the next term of court.

In the Circuit Court of the United States, Western District of Michigan.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant.

To the honorable the judges of the circuit court of the United States for the western district of Michigan:

The Ann Arbor Railroad Company, a corporation organized and existing under the laws of the State of Michigan and a citizen of said State, now comes and files its cross-bill against the Western Union Telegraph Company (hereinafter designated as the telegraph company) a corporation organized and existing under the laws of the State of New York, and a citizen of said State and thereupon complaining says:

1st. That on or about the 15th day of October, 1895, the said telegraph company filed its bill of complaint against the Ann Arbor Railroad Company in the circuit court of the county of Benzie, State of Michigan, in the district aforesaid, setting forth in substance that on the 25th day of September, 1890, the Frankfort & Southeastern Railroad Company a corporation of the State of Michigan being the owner of and operating a line of railroad from Frankfort in said State to the western terminus of the Toledo, Ann Arbor & North Michigan railway, near Copemish in said State, entered into a written contract in writing with the telegraph company providing for the construction and maintenance of a line of telegraph along the entire length of its said railroad a copy of which said contract is attached to said bill and is hereto attached and made a part hereof.

Said bill also set forth that in pursuance of said contract said line was built by said telegraph company in May, June and July, 1891, and operated as therein provided by the telegraph company and the Frankfort & Southeastern Railroad Company and the Toledo, Ann Arbor & North Michigan Railway Company (a Michigan corporation) which became the owner of the railroad of said The Frankfort & Southeastern Railroad Company by purchase in May, 1892.

Said bill also set forth the making by said Toledo, Ann Arbor & North Michigan Railway Company, subsequent to the execution of said contract, of a mortgage of its entire railroad to the Farmers' Loan & Trust Company, as trustee; the foreclosure of said mortgage by proceedings in the United States circuit court for the eastern district of Michigan; the sale under order of said court of said railroad to the Ann Arbor Railroad Company; and the confirmation of said sale by said court; that the telegraph company was not a party to said suit; that the said Ann Arbor Railroad Company purchased said railroad with full knowledge of the rights of the telegraph company on the line of telegraph therein described; that said purchaser claimed not to be bound by said contract and had given the telegraph company written notice to this effect; that the said telegraph company is engaged in an extensive telegraph

business and had duly accepted the provisions of the act of the United States of July 24, 1866; that the Ann Arbor Railroad Company was bound by the provisions of said contract; that independently of said contract the telegraph company had a right to maintain its telegraph line on said railroad property under the statute of the United States; that about the 1st day of October, 1895, the Ann Arbor Railroad Company took possession of its wires between Thompsonville and Frankfort and cut off their connection with its other wires and deprived the telegraph company of its telegraphic connection with Frankfort and at the same time continued to use said wires for its own business; that subsequently said telegraph company reconnected said wires and regained possession thereof; but fearing that said railroad company might again seize possession of said line of telegraph said telegraph company prayed for an injunction restraining said railroad company from interfering with the telegraph company in the possession and use of said wires as it had been accustomed to use them, and praying
26 for the specific enforcement as against the Ann Arbor Railroad Company of said contract; whereupon a preliminary injunction was allowed by said circuit court of Benzie county restraining the defendant from interfering with the possession and use of said wires by the telegraph company in the way it had been accustomed to use them.

2nd. That by appropriate proceedings said cause was removed to this court by the defendant, The Ann Arbor Railroad Company.

3rd. That thereupon your orator filed its answer fully responding to the averments of the said bill, to which answer it now refers and the allegations of which it adopts as though set out herein.

4th. That in this its cross-bill, your orator says that it does claim not to be bound by said contract of September 25, 1890, between the telegraph Co., and the Frankfort & Southeastern Railroad Company, that it gave written notice to that effect to the telegraph company prior to the time of taking possession by it of said railroad property and prior to the beginning of said suit.

5th. That the Frankfort & Southeastern Railroad Company had prior to May, 1892, when your orator purchased its said railroad, duly complied with the terms of said contract by it to be performed and in particular had furnished the poles and labor necessary in the construction of said line of telegraph.

6th. That the poles so furnished by said Frankfort and Southeastern Railroad Company were as your orator believes, included in and covered by the mortgage executed by the Frankfort & Southeastern Railroad Company on the 1st day of March, 1889, and as such passed to your orator as the assignee of the purchaser at the sale under foreclosure of said mortgage as set forth in the second paragraph of the answer to the original bill to which reference is here made; that your orator does not claim that the wires and insulators and other parts of said line of telegraph furnished by the telegraph company are the property of the Ann Arbor Railroad Company.

7th. Since the allowance of said order of injunction and by reason

thereof your orator and said telegraph company have been using and operating said line of telegraph in substantially the same way as prior to the beginning of said suit.

8th. Your orator, therefore, not being as it conceives, bound by said contract and being unwilling longer to operate under the same.

To the end that the defendant in this cross-bill, The Western
27 Union Telegraph Company, may answer hereto but not under oath, answer under oath being expressly waived.

Your orator prays that said contract of September 25th, 1889, be cancelled and held for naught as against the Ann Arbor Railroad Company; that an accounting may be had as between the parties as touching their respective rights and interests in and to the property constituting said line of telegraph; that said telegraph company may be required to desist and refrain from making use of the property of your orator for the operation of its telegraph wires and to remove the same from your orator's property, and for such other or different relief as may be agreeable to equity and good conscience.

Your orator asks that a subpœna in the usual form be issued out of this court commanding the Western Union Telegraph Company to be and appear before this court on a day named and to answer to this cross-bill.

THE ANN ARBOR RAILROAD COMPANY,
By ALEX. L. SMITH, *Its Solicitor.*

ALEX. L. SMITH, *Of Counsel.*

Copy.

This agreement made and entered into this twenty-fifth day of September, 1890, by and between the Western Union Telegraph Company of the first part, and the Frankfort and Southeastern Railroad Company of the second part, hereinafter designated respect*fully* as the telegraph company and the railroad company.

Witnesseth, that, whereas the railroad company owns and operates a railroad between Frankfort and the western terminus of the Toledo, Ann Arbor and Northern Michigan railroad near Copemish, in the State of Michigan, along which railroad and any extensions or branches thereof, it is proposed that a telegraph line shall be constructed, maintained and operated;

Now, therefore, for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

First. The railroad company agree to furnish and distribute for the telegraph company, free of cost, along the railroad company's line of railroad between Frankfort and said terminus near Copemish, and along all extensions and branches thereof, as fast as the same shall be completed and in operation, cedar poles, well proportioned and properly peeled, not less than thirty (30) poles to
28 the mile, and at least twenty-five (25) feet in length and six (6) inches in diameter at the small end.

The railroad company also agrees to furnish free of cost to the telegraph company all the labor to dig holes and set said poles in

the ground and to place the wires and insulators thereon under the direction of a foreman to be furnished by the telegraph company. And the railroad company agrees at its own expense, to maintain said poles and the wire or wires thereon, in good order and repair, and to reconstruct said poles and wire or wires when required by the telegraph company, wire and insulators for such repair and reconstruction being furnished by the telegraph company at its expense, as hereinafter provided, and the poles and labor for such repair and reconstruction to be furnished by the railroad company free of charge to the telegraph company.

The telegraph company agrees to furnish at its expense a foreman who shall oversee and direct the work of construction and reconstruction herein provided for.

It is understood and agreed that the railroad company shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the telegraph company has or may have along said railroad for its business, that the railroad company does to in the maintenance and repair of the wire or wires used exclusively by it.

It is further understood and agreed that the telegraph company's poles now standing along or near the railroad company's railroad along Crystal Lake beach may be used by the railroad company until the same require to be replaced when the railroad company shall furnish and erect new poles and transfer the wire or wires thereto.

Second. The telegraph company agrees to furnish at its expense, at some station on the line of said railroad number nine galvanized wire and insulators for the construction of a telegraph line of one wire along said railroad between Frankfort and said terminus near Copemish, and along all extensions and branches of said railroad as fast as the same shall be completed and in operation, and the telegraph company further agrees to furnish wire and insulators for the maintenance, repair and reconstruction of its line and its wires along said railroad and extensions and branches thereof, and will deliver the same as above free of cost to the railroad company as they may be needed. The telegraph company will also furnish the use of its main batteries in its main offices for the operation of the wires herein provided for.

29 The railroad company agrees to furnish free of charge in its station-houses, suitable space for and attention to main batteries when required by the telegraph company.

Third. The telegraph company agrees to set apart the first wire erected along said railroad and the first wire erected along extensions and branches thereof, for the joint use of the parties hereto in the transmission of railroad and commercial telegraph business, it being agreed that the railroad company's messages of an important character, directing the movement of trains, shall have precedence over said joint wire.

Whenever the railroad business of the railroad company requires the exclusive use of said joint wire, the telegraph company on receiving ninety (90) days' written notice, agrees to furnish the mate-

rial for the construction of a wire for commercial business, the railroad company agreeing to furnish at its expense the labor for, and to pay the expenses of erecting the same, under the direction of a foreman to be furnished by the telegraph company. After the erection of said second wire, the first wire shall be set apart for the railroad company's railroad business exclusively, and for such commercial business as can be done thereon without interfering with said railroad business. In case of the interruption of either one of said two wires, the business of both parties hereto shall, as far as practicable, be done over the working wire, important railroad messages directing the movement of trains having precedence.

Fourth. Either party to this agreement may establish and maintain telegraph stations at such places on said railroad as it may deem necessary and at all such stations as the railroad company may establish, the telegraph company agrees to supply Morse instruments and local batteries, and blank forms and stationary for commercial business.

At all telegraph stations of the railroad company it shall furnish operators at its own expense; and its operators and other employés acting as agents of the telegraph company, shall receive, transmit and deliver exclusively for the telegraph company party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company thereon, and shall render to the telegraph company exclusively, monthly statements of such business and full accounts of all receipts therefrom, and the railroad company agrees to pay all of such receipts to the telegraph company in such manner and at such times as it may direct. And said operators and other employés shall not, without the consent of the telegraph company, transmit over said telegraph line any free messages except those herein provided for, and concerning all telegraph business, whether paid or free, shall conform to all rules, regulations and orders of the telegraph company applicable thereto. No employé of the railroad company shall while in its service be employed in the transaction of commercial or public business by or for any party other than the telegraph company pay thereto; and the telegraph company shall have the exclusive right to the occupancy of the railroad company's depots and station-houses for commercial or public business as against any other party.

Fifth. All messages of the officers and agents of the railroad company, pertaining to its railroad business, shall be transmitted free of charge by railroad operators on the wire set apart for said business between all telegraph stations on the line of said railroad.

The telegraph company agrees to issue to such officers of the railroad company, as may be designated by the president or general superintendent thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the railroad company's railroad covered by this agreement, originating at and destined to points on the telegraph company's lines in the United States, beyond or off the line of said railroad, to an amount not exceeding two hundred and fifty dollars ($250.00) per annum

for the first twenty-five (25) miles of railroad constructed by the railroad company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and six dollars ($6.00) per annum additional for each additional mile of railroad so constructed, owned, leased, or controlled by the railroad company and occupied as aforesaid.

The tolls on all such messages to and from points beyond or off the line of said railroad shall be calculated at the regular commercial day rates of the telegraph company between the points at which such messages originate and the points to which they may be destined. And the railroad company agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the railroad company's railroad covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering sleeping-car, parlor-car or steamer berths, merchandise or accommodations for customers of the railroad company, the tolls on which messages shall be paid by such customers.

Sixth. The railroad company agrees to transport free of charge over its railroad upon application of the superintendent or other officer of the telegraph company, all persons in the employ of the telegraph company when traveling on the business of said company, and also to transport and distribute free of charge along the line of its railroad, all poles and other material and supplies for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by this agreement, and of such additional wires and lines of poles and wires as may be erected under the provisions of this agreement, and also all material and supplies for the establishment, maintenance and operation of the office of each of the parties hereto at places along and adjacent to or at the termini of said railroad.

Seventh. If the telegraph company elects to establish an independent office at a station of the railroad company, the railroad company shall furnish office room, light and fuel free of charge in such station, and if at such station one person can attend to the telegraph business of both companies, the agent of the telegraph company, acting for and as the agent of the railroad company in the premises, shall do such business of the railroad company without charge.

Whenever the telegraph business of both companies at any such office becomes so large that more than one operator is needed to attend to it, then the railroad company shall employ and pay its own operator.

Eighth. The railroad company, so far as it legally may, hereby grants and agrees to assure to the telegraph company, the exclusive right of way on, along and under the line, lands and bridges of the railroad company, and any extensions and branches thereof, for the construction, maintenance, operation and use of lines, of poles and

wires and underground or other lines for commercial or public uses or business, with the right to put up or construct or cause to be put up or constructed from time to time such additional wires and such additional lines of poles and wires and underground or other lines as the telegraph company may deem expedient, and the railroad company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction
32 and maintenance of the lines and wires provided for herein, and the railroad company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other line in competition with the lines of the telegraph company party hereto, except at and for the railroad company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations.

Provided always, that in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, but shall indemnify and save harmless the railroad company from any and all damages, costs, charges and legal expenses incurred therein or thereby.

Ninth. It is a condition of this contract that the railroad company is not to be responsible for, and the telegraph company hereby covenants and agrees to save the railroad company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company while being carried free over said railroad under this agreement, and from any neglect or failure in the transmission or delivery of messages for any person doing business with the telegraph company and on account of any other public telegraph business; and the telegraph company shall not be responsible for, and the railroad company agrees to indemnify and save harmless the telegraph company against any loss or damages of any kind arising from or on account of any error, failure, delay or default in the transmission or delivery of any and all messages sent by or for the railroad company under this agreement.

Tenth. The railroad company shall have the right to the free use of any telegraphic patent rights or new discoveries or inventions that the telegraph company now owns and uses in its general telegraph business, or which it may hereafter own and use as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroad as provided for herein.

Eleventh. It is mutually understood and agreed that the telegraph line, poles, wires and fixtures covered by this contract shall be the property of the telegraph company and shall form part of its general telegraph system, and shall be controlled and regulated by the telegraph company, which shall fix and determine all tariffs for the transmission of messages, and all connections with other lines and interests.

33 Twelfth. The provisions of this agreement shall extend to all railroads now owned, leased, controlled or operated, and to all railroads hereafter owned, leased, controlled or operated by the railroad Co., or by any company or corporation, in which the railroad company may own a majority of the stock, or whose action it may be able to control by the ownership of stock or otherwise and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from the twenty-fifth day of September, 1890, and shall continue after the close of said term until the expiration of one (1) year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two other chosen, and the decision of such arbitrators, or of a majority thereof shall be final and conclusive.

In witness whereof, the parties to these presents have caused the names of their proper officers to be hereunto subscribed, and their corporate seals to be attested, the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY,

[SEAL.] (Signed) By JOHN VAN HORNE,
Vice-President.

(Signed) A. B. BREWER, *Secretary.*

THE FRANKFORT AND SOUTH-EASTERN RAILROAD COMPANY,

[SEAL.] (Signed) By HENRY DAY, *President.*

(Signed) D. B. BUTLER, *Secretary.*

No. 1198. In the circuit court of the United States, western district of Michigan. The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Company, defendant. Cross-bill. Filed April 13, 1896. Chas. L. Fitch, clerk. Alexander L. Smith, sol's for the Ann Arbor R. R. Co. and of counsel.

34 United States Circuit Court, Western District of Michigan, Southern Division.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant.

Stipulation as to Facts.

In the above-entitled cause it is agreed and stipulated by and between the parties hereto, the Western Union Telegraph Company, and the Ann Arbor Railroad Company, in addition to the matters and things alleged in the bill of complaint, which are not denied by the answer, that the matters and things alleged as mat-

ters of fact in the second paragraph of the answer are true; that the allegations in the tenth paragraph of the bill are true; (the seventh paragraph of the answer of the defendant being withdrawn); that the allegations contained in paragraphs five and seven of the cross-bill of the defendant against the complainant herein filed are true; that all the parties through whom defendant claims title as well as defendant, bought with full knowledge of the complainant's rights and claims under said contract with the Frankfort and Southeastern Railroad Company, and that if the value of the telegraph line in controversy becomes material, evidence may be taken thereon by either party; and that this cause may be submitted to the court for final decree upon the pleadings and this stipulation as to facts.

ALEXANDER L. SMITH,
Solicitor for Defendant.

C. A. KENT,
Solicitor for Plaintiff.

No. 1198. U. S. circuit court, western district of Michigan, southern division. The Western Union Telegraph Company, complainant, *vs.* The Ann Arbor Railroad Co., defendant. Stipulation as to facts. Filed June 22, 1896. Chas. L. Fitch, clerk. Alexander L. Smith, solicitor for defendant.

35 March Term, A. D. 1897.

MONDAY, *March* 8, 1897.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE ANN ARBOR RAILROAD COMPANY

and

THE ANN ARBOR RAILROAD COMPANY
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

Bill and Cross-bill. No. 1198.

These causes coming on for hearing by consent of counsel for the respective parties, upon pleadings and a stipulation of facts, were duly argued by C. A. Kent, Esq., of counsel for said Western Union Telegraph Company, and A. L. Smith, of counsel for said Ann Arbor Railroad Company, and thereupon the court took the same under advisement.

Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE ANN ARBOR RAILROAD COMPANY.

In this case I reach the following conclusions:

1. That the contract entered into on the 25th day of September, 1890, between the Frankfort & Southeastern Railroad Company and the complainant, The Western Union Telegraph Company, was, in all respects except in so far as it purports to create an easement in the real estate in the nature of a right of way, a contract personal to the Frankfort & South Eastern Railroad Company.

2. That the burden of that contract, which had rested upon the Frankfort & South Eastern Railroad Company, did not pass
36 to and become a charge upon the defendant in this case upon its purchase under the foreclosure of the mortgage or mortgages upon the Frankfort & South Eastern Railroad Company's lands and property; unless by some further agreement, express or implied, between the defendant, The Ann Arbor Railroad Company, and the telegraph company, the stipulations of the contract should be continued as between them.

3. The defendant railroad company might by its conduct in reference to the telegraph company's lines and property, raise such an implication of its assent to such a contract as would establish ground for conclusively imputing to the railroad company such an adoption of the contract as its own.

4. There is no evidence in this case which would justify the conclusion that the Ann Arbor Railroad Company either did adopt, or ought in equity to be held to have adopted the contract as its own. Its conduct in so far as it might be regarded as in joint occupation with the telegraph company of the lines and property has not been voluntary, but has been in obedience to the mandate of this court; and there would be no justice in using such acts, done in obedience to the court, as a voluntary acquiescence in the contract which the Ann Arbor Railroad Company appears to have repudiated from the company's own organization, or rather, from the beginning of its dealing with the matter in controversy.

5. In respect of the right of way, a supposed easement affecting the real estate, and which it is claimed created rights outlasting the continuance of the personal covenants in the contract, my opinion is that the right to the easement ceased with the continuance of the personal covenants; that it was necessarily incident to the personal covenants, but it has no foundation upon which it could last independently of the personal covenants. And further, this being so, I think that it should be held that the parties in the making of the original contract, knowing as they must be presumed to know, that this would be the natural consequence, must be held to have intended that the easement should not continue for the term stated unless the principal things contemplated by the contract should

continue to endure, and require in order to give them effect that the easement should also continue, which is not the case. No foreclosure is necessary. The easement has ceased.

6. The telegraph company has the right to remove the personal property which by the terms of the contract were to inure to and belong to it, and it has, under the circumstances attending
37 the entry of the present railroad company upon the lands and property of the Frankfort & South Eastern Railroad Company, an implied license to enter upon the property and remove the same.

7. The bill should be retained only for the purpose of an accounting upon the transactions between the parties during the pendance of the suit, if there is occasion for such accounting; and upon the adjustment of the accounts, if there are any to be adjusted, there should be an order for the payment of any balance, and thereupon for a dismissal of the bill. If there is no occasion for any accounting let there be an order for the dismissal of the bill.

8. The proceedings on the part of the railroad company in reference to the property in question were sufficient to move the court to an exercise of its discretion in respect of the matter of costs, and the order in that regard will be that neither party recover costs.

H. F. SEVERENS,
U. S. District Judge.

No. 1198. Circuit court of the United States, western district of Michigan, southern division. In equity. The Western Union Telegraph Co. *vs.* The Ann Arbor Railroad Company. Opinion of the court. Filed March 18, 1897. Chas. L. Fitch, clerk.

March Term, A. D. 1897.

TUESDAY, *May* 4, 1897.

The court met pursuant to adjournment.

Present: The Honorable Henry F. Severens, district judge.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
THE ANN ARBOR RAILROAD COMPANY, Defendant,

and

THE ANN ARBOR RAILROAD COMPANY, Complainant,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

} Bill and Cross-bill. No. 1198.

38 This day came the complainant, The Western Union Telegraph Company, by C. A. Kent, its solicitor, also came the defendant, The Ann Arbor Railroad Company, by Alexander L.

Smith, its solicitor, and thereupon this cause came on for trial and was submitted to the court upon the bill of complaint, the answer of the defendant, the replication of the complainant, and the cross-bill herein filed by the defendant, together with a stipulation as to the facts herein agreed upon and filed by the parties and was argued by counsel. Upon consideration whereof the court finds that the equity of said case is with the defendant, The Ann Arbor Railroad Company; that the contract of September 25, 1890, between the Frankfort and Southeastern Railroad Company, and the complainant, The Western Union Telegraph Company, is not binding upon the defendant, The Ann Arbor Railroad Company, and that the easement upon the property of the defendant, The Ann Arbor Railroad Company, claimed by the said complainant under the provisions of said contract has ceased.

The court further finds that said complainant has the right to enter upon the property and right of way of the defendant company for the purpose of removing the personal property which by the terms of said contract was to enure to and belong to said complainant company, but for no other purpose.

And it further appearing to the court that there is no necessity for retaining said bill for the purpose of an accounting upon the transactions between the parties during the pendency of this suit, it is ordered, adjudged and decreed that said bill be and the same is hereby dismissed; and it further appearing to the court that said cross-bill is not necessary, it is ordered that the same be and it is hereby dismissed.

And for good cause shown it is ordered that neither party recover the costs herein.

In the Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE ANN ARBOR RAILROAD COMPANY.

Said complainant, the said Western Union Telegraph Com-
39 pany, hereby claims an appeal from the decree of the court in this cause to the court of appeals of the 6th circuit and asks that it be allowed by the court.

C. A. KENT,
Sol. and of Counsel for Compl't.

No. 1198. In the circuit court of the United States for the western district of Michigan, southern division. The Western Union Telegraph Co. *v.* The Ann Arbor Railroad Co. Claim of appeal. I here allow the within claim of appeal. H. F. Severens, dist. judge. May 18th, 1897. Filed May 18, 1897. Chas. L. Fitch, clerk. C. A. Kent, sol. and of counsel for compl't.

In the Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE ANN ARBOR RAILROAD COMPANY.

Assignment of Errors.

The said complainant assigns as error the decree in this cause, that it is for the dismissal of the bill, whereas the decree should have been for complainant in accordance with the prayer of the bill. Complainant asks that the decree be reversed and a decree entered for complainant in accordance with such prayer.

C. A. KENT,
Sol. and of Counsel for Compl't.

No. 1198. The circuit court for the United States for the western district of Michigan, southern division. In equity. The Western Union Telegraph Company *v.* The Ann Arbor Railroad Company. Assignment of errors. Filed May 18, 1897. Chas. L. Fitch, clerk. C. A. Kent, sol. and of counsel for compl't.

Know all men by these presents, that we, The Western Union Telegraph Company, a corporation organized under the laws of New York, as principal, and Cornelius Corbett and Michael
40 S. Corbett, of Detroit, Michigan, as sureties, are held and firmly bound unto the Ann Arbor Railroad Company, a corporation organized under the laws of Michigan in the full and just sum of two thousand dollars ($2,000.00), to be paid to the said Ann Arbor Railroad Company, its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a session of the circuit court of the United States for the western district of Michigan, southern division, in chancery, in a suit depending in said court, between said Western Union Telegraph Company and said Ann Arbor Railroad Company a decree was rendered against the said Western Union Telegraph Company and the said Western Union having obtained an allowance of a claim of appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Ann Arbor R. R. Co., citing and admonishing it to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the — day of —— next:

Now, the condition of the above obligation is such, that if the said Western Union Telegraph Company shall prosecute its appeals to effect, and answer all damages and costs if it fail to make its

plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the Western Union Telegraph Co.]

WESTERN UNION TELEGRAPH
COMPANY, [SEAL.]
By THOS. T. ECKERT,
President. [SEAL.]
CORNELIUS CORBETT. [SEAL.]
MICHAEL S. CORBETT. [SEAL.]

A. R. BREWER, *Secretary.*

Seal and delivered in the presence of—
—— ——.

Approved by—
H. F. SEVERENS,
U. S. Dist. Judge.

STATE OF NEW YORK, } ss:
County of New York, }

On this 10th day of May, A. D. 1897, before me personally appeared Thomas T. Eckert, president of the Western Union Telegraph Company, to me known, who, being by me duly sworn, did depose and say that he resides in the city, county and State of New York; that he knows the corporate seal of the Western
41 Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he signed the same as president. And on the same day and year before me personally appeared Abijah R. Brewer, secretary of the said company, to me known, who, being duly sworn, did depose and say that he resides in the borough of Glen Ridge, county of Essex and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he attested the same as secretary.

[NOTARIAL SEAL.]

WM. ARNOUX,
Notary Public, New York County.

No. 1198. The Western Union Tel. Co. *v.* The Ann Arbor Railroad Co. Bond on writ of error or appeal to the United States circuit court of appeals for the sixth circuit. Filed May 18, 1897. Chas. L. Fitch, clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

To the Ann Arbor Railroad Company, a corporation under the laws of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 10th day of June next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the western district of Michigan, southern division, in equity, wherein The Western Union Telegraph Company, a corporation, is complainant and appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appellant's assignment of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of May, in the year of our Lord
42 one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

HENRY F. SEVERENS,
U. S. Dist. Judge.

I hereby accept service of the within.

ALEXANDER L. SMITH,
Sol. for the Ann Arbor Railroad Company.

Toledo, May 20, 1897.

No. 1198. The circuit court of the United States for the western district of Michigan, southern division. In equity. The Western Union Telegraph Co., complainant and appellant, *vs.* The Aann Arbor Railroad Co. Citation. Filed May 22, 1897. Chas. L. Fitch, clerk.

THE UNITED STATES OF AMERICA, *Western District of Michigan, Southern Division,* } *ss:*

I, Charles L. Fitch, clerk of the circuit court of the United States for the western district of Michigan, do hereby certify that the annexed and foregoing are true and compared copies of the transcript from State court, answer, motion to dissolve injunction, replication, stipulation contending to filing of cross-bill, cross-bill, stipulation as to facts, opinion of the court, and bond on appeal filed, and of the order granting leave to file cross-bill, the record of final hearing, and decree entered in the within-entitled cause, and of all the proceedings in said cause so far as the same appear of record in my

* Not exceeding 30 days from the day of signing.

office and of the whole thereof, together with the original claim of appeal and order allowing appeal, assignments of error and citation in said cause.

Witness my official signature and the seal of said court at the city of Grand Rapids in said district and division this 27th day of May in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

[SEAL.] CHARLES L. FITCH, *Clerk.*

43 On June 1st, 1897, the following appearance was filed, which reads as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1896.

WESTERN UNION TELEGRAPH CO. *v.* ANN ARBOR RAILROAD CO. } No. 524.

To the clerk of said court:

Please enter my appearance as counsel for the appellant.

C. A. KENT,
Sol. & of Counsel for Western Union Tel. Co.

And on December 13th, 1897, an entry was made upon the journal of said court, which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

WESTERN UNION TEL. CO. *v.* ANN ARBOR R. R. CO. } Appeal from the Circuit Court of the United States for the Western District of Michigan. Before Taft, Lurton, and Clark, JJ.

This cause came on this day to be heard, and was argued by Mr. Rush Taggart and Mr. C. A. Kent for the appellant, and by
44 Mr. Alexander L. Smith for the appellee, and was submitted to the court for decree.

And on November 9th, 1898, an opinion was rendered in said cause in said court, which reads and is as follows:

Opinion.

45 United States Circuit Court of Appeals, Sixth Circuit.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Appellee.	No. 524. Appeal from the Circuit Court of the United States for the Western District of Michigan.

Submitted Dec. 13, 1897; decided Nov. 9, 1898.

Taft and Lurton, circuit judges, and Clark, district judge.

This was a bill in equity by the Western Union Telegraph Company:

1st. To restrain the defendant, The Ann Arbor Railroad Company from interfering with the telegraph wires and poles of the complainant, running from Thompsonville to Frankfort, on the line of the defendant's railroad.

2d. To compel the defendant to allow the complainant to reconnect the wires to the complainant's main line on the Chicago & Western Michigan railroad and to use the wires for its telegraph business as they were used before they were disconnected by the defendant; and,

3d. To require the defendant to carry out the contract under which said poles and wires were erected made by the Western Union Telegraph Company with the Frankfort & Southeastern Railroad Company, a former owner of this part of defendant's line of railway.

The complainant relies in its bill, not only upon the contract made with the Frankfort & Southeastern Railroad Company as binding upon the defendant, but also upon the provisions of the act of Congress passed July 24, 1866, the provisions of which the complainant company accepted and which the bill avers confers a right upon the complainant to maintain its telegraph line on the railroad as a post-road of the United States.

46 The defendant answered setting forth the circumstances under which it acquired title and after replication the case was heard on the following agreed statement of facts:

That on March 1, 1889, the said The Frankfort & Southeastern Railroad Company, executed a mortgage upon all its property and assets of every kind and description, whether then owned or thereafter to be acquired by said company, to Henry Day and Albert C. Hall as trustees, which mortgage was thereupon, to wit, on the 11th day of May, 1889, duly recorded in the counties through which the road passed; that the road was sold by the mortgagor to the Toledo, Ann Arbor & North Michigan Railway Co.; that subsequent mortgages were issued by the grantee company, and there was a default upon all the mortgages, including the one first above mentioned and foreclosure proceedings were begun upon all of them; that the

railroad here in question was sold at foreclosure sale under the mortgage of March 1, 1889, to the trustees under said mortgage, from whom, by mesne conveyance the title was transferred to the defendant, The Ann Arbor Railroad Company; that the complainant was not a party to these foreclosure suits; that the contract between the complainant and the Frankfort & Southeastern Railway Company was entered into on the 25th day of September, 1890, more than a year after the execution of the mortgage to Day and Hall, trustees; that Day and Hall, trustees, knew of the contract and complainant's claim of right under it before foreclosure; that the Ann Arbor Railroad Company was delivered possession of the railroad by the order of the court in the foreclosure proceedings and that after notice to the complainant, it declined to recognize any obligation upon it, arising from complainant's contract with the Frankfort & Southeastern Railroad Company, and disconnected the wires as averred in the bill.

By complainant's contract with the Frankfort & Southeastern Railroad Company, the latter agreed to furnish and distribute for the telegraph company, free of cost, along the line of the railroad, cedar poles, thirty to a mile, to furnish all the labor to dig the holes in which to set the poles, to place the wires and insulators thereon, under the direction of a foreman of the telegraph company, to maintain the poles and wires at its own expense in good order and repair, and to reconstruct them when required by the telegraph company. The telegraph company agreed to furnish the wires and insulators for the entire line and the necessary batteries; the railroad company agreed to furnish, free of charge, in its station-
47 houses, suitable space for batteries. The telegraph company agreed to set apart the first wire erected along said railroad for the joint use of the parties to the contract for the transmission of railroad and commercial telegraph business. By the fourth section it was agreed that either party might establish telegraph stations at such places as it might deem necessary; that the telegraph company should furnish the instruments; that the railroad company should furnish the operators, and all messages pertaining to the railroad business should be transmitted free. The railroad company agreed to transport, free of charge, all officers and employés and all material for the use of the telegraph company, and if the telegraph company elected to establish an independent office at a station of the railroad company, the railroad company agreed to furnish office room, light and fuel, free of charge in such station. The eighth section was as follows:

"Eighth. The railroad company, so far as it legally may, hereby grants and agrees to assure to the telegraph company, the exclusive right of way on, along and under the line, lands and bridges of the railroad company, and any extensions and branches thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to put up or construct or cause to be put up or constructed, from time to time, such additional lines of poles and wires and underground or other lines as the telegraph company

may deem expedient, and the railroad company agrees to clear, and keep clear, said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the railroad company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other lines in competition with the lines of the telegraph company, party hereto, except at and for the railroad company's regular local rates, nor will it furnish for any competing lines any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations.

Provided always that in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, but shall indemnify and save harmless the railroad company from any and all damages, costs, charges and legal expenses incurred therein or thereby."

By the eleventh section it was "mutually understood and
48 agreed that the telegraph line, poles, wires and fixtures covered by the contract shall be the property of the telegraph company and shall form part of its general telegraph system, and shall be controlled and regulated by the telegraph company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and interests." By the twelfth section the provisions of the agreement were extended to all railroads then owned, leased, controlled or operated by the Frankfort & Southeastern Company and to all railroads thereafter owned, leased, controlled or operated by that company or by any company or corporation, in which that company might own a majority of the stock, or whose action it might be able to control by ownership of stock or otherwise. The provisions of the contract, it was stipulated should be and continue in force for and during the term of twenty-five years from the 25th day of September, 1890, and should continue after the close of the term until the expiration of one year after written notice should have been given after the close of the term by either party to the other of an intention to terminate the same.

The circuit court held that the contract was in all respects, except in so far as it purported to create an easement in the real estate in the nature of a right of way, a contract personal to the Frankfort & Southeastern Railroad Company; that the burden of that contract did not pass to and become a charge upon the defendant in this case upon its purchase under the foreclosure of the mortgage or mortgages upon the Frankfort & Southeastern Railroad Company's lands and property, unless by some conduct the Ann Arbor railroad could be held to have adopted the contract as its own, and that no such conduct was proven in the case; that in respect of the right of way, a supposed easement affecting the real estate, and which it was claimed, created rights outlasting the continuance of the personal covenants in the contract, the right to the easement ceased with the continuance of the personal covenants and had no foundation upon which it could last independently of the personal covenants; and

further that this being so, the parties in the making of the original contract, knowing as they must be presumed to know, that this would be the natural consequence, must be held to have intended that the easement should not continue for the term stated unless the principal things contemplated by the contract should continue to endure, and require in order to give them effect that the easement should also continue; that no foreclosure was necessary; that the easement had ceased; that the telegraph company had the right to remove the personal property, which, by the terms
49 of the contract, were to inure to and belong to it, and that it had under the circumstances attending the entry of the present railroad company upon the lands and property of the Frankfort & Southeastern Railroad Company, an implied license to enter upon the property and remove the same. The bill of the complainant was accordingly dismissed.

TAFT, circuit judge, delivered the opinion of the court:

Had the mortgage of the Frankfort & Southeastern Railroad Company the character and incidents of a mortgage at common law, it cannot be doubted that by the entry upon the premises of the assignees of the mortgages, all rights of the telegraph company under its contract would have ceased, and its attempt to continue the enjoyment of the easement said to have been created thereby would have been nothing but a trespass. In England at the common law, title and right of possession passed to the mortgagee at once upon the execution of the mortgage and if the mortgagor remained in possession, he was not more than a tenant at will. He could not bind the mortgagee by any contract or grant with reference to the land mortgaged, and any one entering by his license, lease or grant was as to the mortgagee only a trespasser whom the latter might enter upon and oust, or against whom he might bring ejectment without notice to quit. In Keech *v.* Hall, 1 Dougl., 21, a mortgagor in possession had, after the mortgage, made a lease in writing for seven years. The mortgagee brought ejectment against the lessee of the mortgagor without giving him notice to quit and had judgment. Lord Mansfield said:

"When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not entitled to reap the crop as other tenants at will are, because all is liable to the debt, on payment of which the mortgagor's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage."

The law, even of those States of this country where no change has been made by statute, is more liberal to the mortgagor. Until condition broken, though the title passes to the mortgagee, he holds it merely as security, and not until after a breach has he the right to enter upon the mortgagor or to maintain ejectment against him. The mortgagor has a right to lease, sell and in every respect
50 to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is

understood and held that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. 4 Kent's Com., 157. It is, however, well settled that no contract of lease or otherwise, which the mortgagor may make with respect to the land, either enures to the benefit of the mortgagee or is binding on him. There is in such case no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either, and the entry of the mortgagee into possession under the mortgage merely avoids the lease, and releases the lessee from any obligation. Moran *v.* Pittsburg, Cincinnati & St. Louis Railroad Company, 32 Fed. Rep., 878, 886; Teal *v.* Walker, 111 U. S., 242, 248. Under this general doctrine, it cannot be doubted that in the case at bar, the entry of the mortgagee or his grantee into possession would have avoided all the telegraph company's rights, and that its alleged easement granted for twenty-five years would be at an end. The grantee of an easement for twenty-five years certainly stands upon no higher ground than a lessee for such a term. Indeed, his position is not so good in this case. A lessee has possession of all the land mortgaged, and may, perhaps, be said to have acquired *pro tanto* the equity of redemption and an estate in the land. The holder of this easement, which can only be enjoyed in connection with certain personal covenants certainly not binding on the mortgagee, has no possession of the land mortgaged in any proper sense, but merely a right *in alieno solo* against the mortgagor. If, therefore, an entry of the mortgagee upon the lessee would avoid his interest in the land, *a fortiori* would it end the interest of one who holds from the mortgagor nothing but a naked right in the nature of an easement in gross and incapable of enjoyment, except upon terms in nowise binding upon the mortgagee.

The question which remains for our consideration is whether in Michigan, where this railroad lies, the character of a mortgage differs so widely from that of mortgages in other States, that the result of the law of mortgages in other States would not obtain there. It is provided by statute in Michigan (Howell Ann. St., sec. 7847), that no action of ejectment shall hereafter be maintained by a mortgagee or his assigns or representatives for the recovery of the mortgaged premises until the title thereto shall have become absolute upon a foreclosure of the mortgage." The effect of this statute is merely to take away the remedy of the mortgagee by entry or ejectment, but it does not in any way affect his rights against those claiming an interest in the premises under the mortgagor. The rule that the mortgagor cannot bind the mortgagee by lease or other contract is not changed thereby. When the mortgagee acquires possession of the mortgaged land by foreclosure sale, the effect of his possession upon those claiming under the mortgagor is just as complete to avoid their rights and interest as was entry or ejectment at common law. Nor does it prevent this result, that the holder of the easement may not have been made a party to the foreclosure suit. The easement was granted subject to being divested by the mortgagee's acquiring possession of the mortgaged premises. That event has happened and the divesting fol-

51

lows. Of course, if the telegraph company had been made a party to the foreclosure, the decree would have settled the rights of the purchaser as against the telegraph company as *res judicata*, and would have conclusively established that the company had no interest in the land after sale. As the company was not a party to the decree, however, the divestiture of its right must be shown by proof of the execution of the mortgage prior to the contract for the easement and the entry into possession by the mortgagee or his assignee under foreclosure and sale. We have found no Michigan authority in point upon this question, but in other States having statutes like the one from Michigan, above quoted, the conclusion we have reached is well sustained by adjudicated cases.

In Iowa, by statute, the mortgagor retains the legal title and the right of possession until foreclosure and sale. Code of Iowa, 1873, p. 357; Jones on Mortgages, sec. 29. In Downard *v.* Groff, 40 Iowa, 597, A. sued G. a covenant of general warranty. G. was the assignee of a mortgage, and at foreclosure bought in the property and sold with warranty to A. The breach assigned was that D., the mortgagor, after the execution of the mortgage, had leased the land to one L., and that L., who had not been made a party to the foreclosure proceeding, had refused to yield possession, and had taken the crops growing at the time of the sale. It was held that no breach was shown, because the purchaser had the right to evict L., and to take the emblements. The court said:

"It may be conceded that since Leroy, the tenant, was in possession under a lease from the mortgagor, and was not made a party to the foreclosure suit, that he is not bound or affected by the judgment therein. But this fact does not alter the rights of the
52 mortgagee, or of the purchaser under the foreclosure sale, as against such tenant. It only affects the remedy and defeats the use of the judgment as evidence. By the lease from Dorstal, the mortgagor, to Leroy, the latter acquired no greater rights in the premises than the mortgagor had. The tenant stands exactly in the situation of the mortgagor. As between the mortgagor and mortgagee, the latter, by the foreclosure and sale, became entitled to the possession of the premises, and to all the crops then growing thereon. This right of the purchaser was not and could not be defeated by reason of the lease, or by the fact that the possession was in, or that the crops were grown by, the lessee. The right to the possession, and the right to the growing crops passed to the purchaser. If the tenant had been made a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but since he was not made a party thereto, he cannot obtain that remedy except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party. It follows, therefore, that Groff, by his purchase and sheriff's deed, became the absolute owner of the premises, including the crops growing thereon; and by his conveyance he invested the plaintiff herein with that ownership, and she might, by proper action, have enforced her

rights as such owner against the tenant. Her failure to do so cannot give her any cause of action against the defendant, her grantor."

In California the title and right of possession of the mortgagor continues until foreclosure and sale. McMillan *v.* Richards, 9 Cal., 365; 1 Jones on Mortgages, sec. 20. In McDermott *v.* Burke, 16 Cal., 580, the action was ejectment by the purchaser at a mortgage foreclosure sale against the lessees under a term of five years granted by the mortgagor after the execution of the mortgage. The lessees had not been made parties to the foreclosure suit.

Chief Justice Field, who had delivered the opinion in McMillan *v.* Richards, *supra*, also delivered the judgment of the court in this case. He said:

"We are of opinion that the legal rights of the lessee were extinguished by the proceedings in the foreclosure suit and sale following the decree thereon. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee at the time had notice of the mortgage, either actual or constructive. The interest of the lessee in such case is dependent for its duration, except as limited by the terms of the lease, upon the enforcement of the mortgage. So long as the mortgage remains unen-
53 forced the lease is valid against the mortgagor, and in this State against the mortgagee; but with its enforcement the leasehold interest is determined. There is no privity of contract or of estate between the purchaser upon the decree of sale and the tenant. The purchaser may, therefore, treat the tenant as an occupant without right, and maintain ejectment for the premises. He cannot, for the want of such privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser until some agreement, express or implied, is made between them with reference to the occupation. Until then, both are equally free from any contract obligations to each other. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered. The purchaser may prefer to have the possession, and the tenant may also prefer to surrender it. * * * The error of the plaintiff arises from the misapprehension of the rule as to the parties necessary to the foreclosure of a mortgage. The rule only requires, as parties, those who are beneficially interested in the claim secured or in the estate mortgaged. The tenant is not thus interested in the claim; he is not entitled to its proceeds when collected, or to any portion of the proceeds. Nor is he thus interested in the estate mortgaged—that is, in the title which is pledged as security. He has not succeeded to such estate, or to any portion of such estate. He does not stand, therefore, in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the sale of the premises, or, rather, with the deed by which the sale is consummated. The right of the tenant to such possession depends upon that of the lessor and goes with it."

In New York no action of ejectment can be sustained by a mort-

gagee for the recovery of the mortgaged premises, and the mortgagor has a right to sell or lease subject to the rights of the mortgagee. In Simers *v.* Saltus, 3 Denio, 214, the suit was by the mortgagor on a covenant of a lease for rent. The defense was eviction. The facts were that the lessor, being the owner in fee of the land, had given a mortgage upon the same before he made the lease upon which suit was brought, and that the mortgagee had foreclosed the property and brought it to a sale; that the purchaser had said to the tenant that he might continue to occupy the land, and the contention was that by such consent, the lessee continued bound
54 under the lease. The court held, however, that by the foreclosure and sale, the lease of the tenant had been extinguished. The court said:

"If the mortgagor, subsequent to the mortgage, lease the premises, the mortgagee cannot distrain or sue for the rent, because there is no privity of contract or of estate, between the mortgagee and tenant, unless the tenant attorn to the mortgagee after the mortgage has become forfeited, which he may do. * * * After foreclosure and sale of the mortgaged premises, in possession of a lessee of a mortgagor, under a lease subsequent to the mortgage, the lessee is considered a wrongdoer, and is not entitled to notice to quit; and against him an action of trespass will lie by the purchaser for taking and carrying away the crops. Lane *v.* King, 8 Wend., 584."

The same principle is laid down in Indiana, a State which has the same statutory provisions in respect to the remedies of the mortgagee as Michigan. Jones *v.* Thomas, 8 Blackford, 423. It is true that in Lockhart *v.* Ward, 45 Texas, 227, it was held by a majority of the court, the chief justice dissenting, that ejectment would not lie in favor of a mortgagee purchasing at the foreclosure sale against the lessee of a mortgagor, who had not been made a party to the foreclosure proceedings, but the weight of authority is to the contrary, as we have seen. A tenant for years under a mortgagor, when evicted by the mortgagee before or after foreclosure, may redeem the mortgage. Averill *v.* Taylor, 8 N. Y., 44; Bacon *v.* Bowdoin, 22 Pick., 401; and it is possible that the grantee of such an easement as this one claimed at the bar might be accorded the same privilege; but however that may be, in the absence of redemption the right to enjoy the easement ended with the entry of the purchaser at foreclosure sale. The complainant company had no right to object, therefore, when the purchaser refused to permit it to enjoy the easement longer and disconnected the wires, and the prayer for an injunction against such acts was rightly denied. The defendant railroad company conceded all that was claimed by the complainant in respect to the personal property and fixtures under clause 11 of the contract, and no controversy arises thereon.

It is contended farther that the telegraph company may continue to maintain a telegraph line over defendant's railroad without its consent by virtue of the act of Congress passed July 24, 1866 (Rev. St., 5263, 5268, 5269). By this act it is provided that any telegraph

company organized under the laws of any State shall have
55 the right to construct, maintain and operate lines of telegraph over and along any of the post-roads of the United States, after filing a written acceptance of the obligations and restrictions of the act. By section 3964, Rev. St., passed in 1872, all railroad- or parts of railroads in the United States are established as post-roads. In Pensacola Tel. Co. *v.* Western Union Telegraph Company, 96 U. S., 111, it was held that the purpose of this legislation was to secure the convenient transmission of intelligence by telegraph in the United States from State to State without State interference, and that it was a legitimate regulation of interstate commerce by Congress. Speaking of the act the court said:

"It gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." Again, the court said: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. * * * If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

The authority establishes, if authority were needed, that the telegraph company cannot occupy the line of defendant's railroad without the consent of defendant or the consent of some predecessor in title, which is binding on the defendant. This, we have seen, is wanting. The suggestion, however, seems to be, if we understand it, that because of the public necessities, the court ought to use its injunction process and shape its decree so as to effect an equitable condemnation of the easement of way. The court has no such power.

The decree of the circuit court is affirmed with costs.

56 And on the same day, to wit, on November 9th, 1898, a decree was entered in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WESTERN UNION TEL. CO. *v.* ANN ARBOR R. R. CO.	}	Appeal from the Circuit Court of the United States for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Michigan, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

57 United States Circuit Court of Appeals for the Sixth Circuit.

THE WESTERN UNION TELEGRAPH Company, Appellant, *vs.* THE ANN ARBOR RAILROAD COMPANY, Appellee.	Assignments of Error and Prayer for Appeal.

Now comes The Western Union Telegraph Company, appellant, and says there is error in the record and proceedings in the above-entitled matter, in this, to wit:

First. The said circuit court of appeals erred in affirming the judgment of the circuit court rendered against The Western Union Telegraph Company, appellant, and in favor of The Ann Arbor Railroad Company, appellee, upon the trial of said cause.

Second. That the said circuit court of appeals erred in holding that the interest of the said appellant under the contract entered into on the 25th day of September, 1890, with the Frankfort & Southern Railroad Company was terminated by the foreclosure of the mortgage given to Henry Day and Albert C. Hall, as trustees, and that the appellant had no further rights along and upon the said railway.

Third. That the said circuit court of appeals erred in hold- that it had no power to ascertain the compensation, if any, due from the appellant to the appellee for the easement along and upon the right of way of the appellee's railroad.

58 Fourth. That the said circuit court of appeals erred in affirming the judgment of the circuit court to the effect that the rights of the appellant under the said contract were purely personal, and that no foreclosure of its rights obtained under the said contract was necessary, and that its easement ceased by virtue of the foreclosure of the mortgage.

Wherefore the Western Union Telegraph Company prays that its appeal to the Supreme Court of the United States may be allowed; that the decree rendered herein against it may be set aside and reversed, and that a decree in its favor as prayed for in its original bill filed in said cause may be entered.

RUSH TAGGART,
Attorney for Appellant, No. 195 *Broadway, New York City, N. Y.*

Appeal allowed.
JOHN M. HARLAN,
Associate Justice, Supreme Court of the United States.

January 7th, 1899.

59 Know all men by these presents that we, The Western Union Telegraph Company, as principal, and George J. Gould and James Merrihew, as sureties, are held and firmly bound unto The Ann Arbor Railroad Company in the full and just sum of five thousand dollars *dollars*, to be paid to the said Ann Arbor

Railroad Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a term of the United States circuit court in and for the western district of Michigan, southern division, in a suit depending in said court between The Western Union Telegraph Company, complainant, and The Ann Arbor Railroad Company, defendant, a decree was rendered against the said The Western Union Telegraph Company, and the said Western Union Telegraph Company having appealed to the United States circuit court of appeals for the sixth circuit, and the said court having, on the 9th day of November, 1898, affirmed said decree with costs, and The Western Union Telegraph Company having obtained an allowance of appeal from the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Ann Arbor Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The Western Union Telegraph Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By THOS. T. ECKERT, *President.* [SEAL.]
GEO. J. GOULD. [SEAL.]
JAMES MERRIHEW. [SEAL.]

Sealed and delivered in presence of—
GEO. H. FEARONS.
GEO. H. FEARONS.
GEO. H. FEARONS.

Approved and to act as a supersedeas by—
(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

January 7th, 1899.

60 UNITED STATES OF AMERICA, ss:

To the Ann Arbor Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the United States circuit court of appeals

for the sixth circuit, wherein The Western Union Telegraph Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this seventh day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

61 The Ann Arbor Railroad Company hereby accepts service of the within citation this 18th day of January, A. D. 1899.

THE ANN ARBOR RAILROAD COMPANY,
By ALEXANDER L. SMITH, *Its Solicitor.*

62 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record and the original citation in the case of The Western Union Telegraph Co. *vs.* The Ann Arbor Railroad Co., No. 524, October term, 1898, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this nineteenth day of January, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No., 17,287. U. S. C. C. of appeals, 6th circuit. Term No., 202. The Western Union Telegraph Company, appellant, *vs.* The Ann Arbor Railroad Company. Filed January 31, 1899.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE ANN ARBOR RAILROAD COMPANY,
Defendant in Error.

This is a writ of error to reverse an order of affirmance of the Circuit Court of Appeals of the Sixth Circuit.

This action was originally brought in the Circuit Court of Benzie County, Michigan, by the Western Union Telegraph Company to restrain the defendant from interfering with the rights of the complainant in a certain telegraph line along the defendant's railway of which the defendant had taken possession (Record, p. 3). The case made by the bill of complaint presented the following facts:

On the 25th day of September, 1890, the Frankfort and Southeastern Railroad Company, a corporation of the State of Michigan, owned a railroad from Frankfort to near Copemish in the State of Michigan. On that day it entered into a contract for the construction and maintenance of a telegraph line along the entire length of its railroad. Under this contract, copy of which was attached to

the bill, complainant built the telegraph line in question. It was the only line of telegraph on the railroad and was used under the terms of the contract until 1885. The Frankfort and Southeastern railroad was sold in 1892 to The Toledo, Ann Arbor and North Michigan Railroad Company, which afterward issued a mortgage upon the property, and in 1893 this mortgage was in default and the road passed into the hands of a receiver and was sold under foreclosure and passed to defendant railroad company. The bill set up the rights of the complainant under the Act of Congress of July 24th, 1866, and that independently of the contract it had the right to maintain its telegraph line upon the line of the railway.

The defendant thereupon filed its petition and bond for removal of the cause into the Federal Court upon the ground of diverse citizenship and upon the ground that the suit was one arising under the laws and constitution of the United States (Record, p. 12).

In the Circuit Court it filed answer and cross-bill (Record, pp. 14 and 20).

Thereupon certain facts were stipulated and the cause submitted.

This stipulation covered the facts stated in the second paragraph of the answer, the tenth paragraph of the bill, the fifth and seventh paragraphs of the cross-bill and admitted that those facts were true. In addition thereto it was admitted that all parties bought the railway with knowledge of the contract under which the telegraph line was built.

Record, p. 28.

These facts were in addition to the facts stated in the bill and not denied by the answer.

The allegations of the bill thus admitted are the following:

"FIRST. That on the 25th day of September, 1890, the Frankfort and Southeastern Railroad Company, a corporation organized under the laws of the State of Michigan, owned and operated a line of railway from Frankfort in the State of Michigan to the western terminus of the Toledo, Ann Arbor and North Michigan railroad, near Copemish, in said State of Michigan; that on said last-mentioned day, complainant entered into a contract with said Frankfort and Southeastern Railroad Company for the construction and maintenance of a telegraph line along the entire length of its said railroad, copy of which contract is attached to this bill and made a part hereof.

"SECOND. That in pursuance of said contract, in May, June and July, 1891, complainant built the telegraph lines provided for therein. One wire was erected for the joint use of the railroad company and complainant. A loop wire to Frankfort and back was put on the same poles for the exclusive use of complainant. From that time until October 1, 1895, both wires have been in constant use—the first by the railroad company and your orator and the last by complainant exclusively. These wires constitute the only means of telegraph communication with Benzonia and Frankfort. They run from a place now called Thompsonville to Frankfort. At Thompsonville they connect with the telegraph line of complainant running north from Grand Rapids on the Chicago and West Michigan Railroad.

"FOURTH. That said Wellington R. Burt is the president of said Ann Arbor Railroad Company and one H. W. Ashley, of Toledo, Ohio, is its general manager; that both of these parties have long been familiar with the terms of the said contract of complainant with the Frankfort and Southeastern Railroad Company and with the rights of complainant in the wires built on the line of said railroad, and your orator avers, on information and belief, that the said Ann Arbor Railroad Company purchased said railroad with a full knowledge of your orator's rights therein.

"FIFTH. Your orator avers that said Ann Arbor Railroad, acting through said Ashley, claims not to be bound by said contract made with the Frankfort and Southeastern Railroad Company and has given your orator written notice to this effect.

"SIXTH. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster-General its acceptance of the provisions of the act of the United States passed July 24, 1866.

"EIGHTH. On or about the first day of October, 1895, said ANN Arbor Railroad, under the direction of its manager, said H. W. Ashley, took possession of complainant's said wires between Thompsonville and Frankfort and cut off their connection with its other wires and deprived your orator of all telegraphic connection with Frankfort and Benzonia. At the same time said company continued the use of said wires exclusively for its own business.

"TENTH. That on the 14th day of October, 1895, your orator reconnected the said telegraph lines running from Thompsonville to Frankfort and so again opened telegraphic communication with the latter place, and is now in full possession and use of said lines. The statements in this paragraph are alleged on information and belief."

The second paragraph of the answer is as follows:

"SECOND. As to the matters and things set forth in the third paragraph of the bill of complaint, this respondent alleges the facts to be as follows: That on or about the first day of March, 1889, the said The Frankfort and Southeastern Railroad Company executed a mortgage upon all of its property and assets of every kind and description, whether then owned or thereafter to be acquired by said company, to Henry Day and Albert C. Hall, as trustees, which mortgage was thereupon—to wit, on the 11th day of May, 1899—duly recorded in the county of Benzie, in which said property was for the most part located, and, as defendant believes, also in the counties of Manistee and Wexford, through or into which said line of railroad extended, and became and continued thereafter to be a first lien upon all the property and assets of said company of every kind and description. That said mortgage was made to secure the issue of bonds of said company to the amount of $235,000, which were duly issued and sold to divers and sundry purchasers, as defendant is informed and believes, at or about the time of the execution and recording of said mortgage. That at the time of the purchasing of the said railroad

of The Frankfort and Southeastern Railroad Company by said The Toledo, Ann Arbor and North Michigan Railroad Company, which took place in the month of May, 1892, said mortgage was an outstanding valid lien, securing the whole of the said issue of bonds upon the property of said The Frankfort and Southeastern Railroad Company so transferred to the said Toledo, Ann Arbor and North Michigan Railroad Company; that, as a part of the consideration of the said purchase and transfer, said The Toledo, Ann Arbor and North Michigan Railroad Company agreed and undertook to pay the indebtedness secured by said mortgage. That by said transfer and purchase the railroad and all the property of the said Frankfort and Southeastern Railroad Company became the property of said The Toledo, Ann Arbor and North Michigan Railway Company.

"This respondent further says that prior to the purchase of said property of the Frankfort and Southeastern Railroad Company—to wit, in the month of January, 1890—the said Toledo, Ann Arbor and North Michigan Railway Company had executed to the Farmers' Loan and Trust Company a consolidated mortgage upon all the property of said company then owned or thereafter to be acquired, being, as respondent supposes, the mortgage which is set up in the third paragraph of the bill of complaint. That said mortgage was made to secure an issue of bonds, a large number of which—to wit, about $1,300,000 in amount, were outstanding at the time of said purchase and transfer. That thereupon, by virtue of the terms of said mortgage, the same became a lien upon all the property of the said The Frankfort and Southeastern Railroad Company, subject, however, to the prior lien of said mortgage to said Hall and Day as trustees.

"This respondent further says that subsequently—to wit, on or about the month of January A. D., 1894, the indebtedness secured by said mortgage of the Frankfort and Southeastern Railroad Company became and was due, and the same being unpaid a suit was begun by the trustees named in said mortgage in this court to foreclose the same, and cause the property to be sold for the satisfaction thereof. That such proceedings were had therein as that all the parties interested were made parties to said suit, and thereupon a decree was rendered for the sale of the said property for the satisfaction of said indebt-

edness, and said property was sold on or about the first day of June, 1895, for an amount largely insufficient to satisfy the said debt to Albert C. Hall and George Lord Day, and thereupon a deed was made by order of said court to said purchasers for the same. And thereupon said purchasers caused to be incorporated under the laws of the State of Michigan a certain corporation named 'The Escanaba, Frankfort & Southeastern Railroad Company,' to which said property was duly conveyed and transferred by said purchasers, and thereupon the said The Escanaba, Frankfort & Southeastern Railroad Company duly transferred in accordance with law all its property and assets to this respondent, who is now the owner of the same. By virtue of the premises this respondent alleges that it became subrogated to and succeeded to all the rights of the mortgagees in said mortgage executed by said Frankfort & Southeastern Railroad Company.

" This respondent says it is true that said consolidated mortgage was foreclosed by appropriate proceedings in this court and the property covered thereby was sold under the decree entered in said foreclosure proceedings subject to the lien of the mortgage executed by the Frankfort & Southeastern Railroad Company as aforesaid so far as said lien extended and that the purchaser at said judicial sale has transferred and conveyed to this respondent all the property and assets so by him purchased as aforesaid. That by virtue of the premises this respondent has become subrogated to and succeeded to all the rights of the mortgagee under said consolidated mortgage. It is true that complainant was not a party to either of the said foreclosure suits."

The fifth and seventh paragraphs of the cross-bill of the defendant were as follows:

" 5th. That the Frankfort and Southeastern Railroad Company had prior to May, 1892, when your orator purchased its said railroad, duly complied with the terms of said contract by it to be performed, and in particular had furnished the poles and labor necessary in the construction of said line of telegraph.

" 7th. Since the allowance of said order of injunction and by reason thereof your orator and said telegraph company have been using and operating said

line of telegraph in substantially the same way as prior to the beginning of said suit."

Upon the agreed facts the Circuit Court held that the contract of September 25th, 1890, was purely personal to the Frankfort and Southwestern Railroad Company, and that upon the foreclosure of the mortgage of 1889 the telegraph company ceased to have any right upon the railroad and directed a dismissal of the bill.

Record, pp. 29 and 31.

From this decree an appeal was taken to the Circuit Court of Appeals, and that Court affirmed the decree of the Circuit Court, upon the same ground (Record, pp. 36, 44).

From that order the Western Union Telegraph Company appealed to this Court. It presents the following assignments of error.

First. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against The Western Union Telegraph Company, appellant, and in favor of the Ann Arbor Railroad Company, appellee, upon the trial of said cause.

Second. That the said Circuit Court of Appeals erred in holding that the interest of said appellant under the contract entered into on the 25th day of September, 1890, with the Frankfort and Southern Railroad Company was terminated by the foreclosure of the mortgage given to Henry Day and Albert C. Hall, as trustees, and that the appellant had no further rights along and upon the said railway.

THIRD. That the said Circuit Court of Appeals erred in holding that it had no power to ascertain the compensation, if any, due from the appellant to the appellee for the easement along and upon the right of way of the appellee's railroad.

FOURTH. That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court to the effect that the rights of the appellant under the said contract were purely personal, and that no foreclosure of its rights, obtained under the said contract, was necessary, and that its easement ceased by virtue of the foreclosure of the mortgage.

ARGUMENT.

I.

The contract of September 25th, 1890, granted to the telegraph company such interest in the railway as was required for the construction, maintenance and operation of a telegraph line, and such interest was not terminated by the foreclosure of the prior mortgage.

The Circuit Court of Appeals in its opinion treated the contract of September 25th, 1890, as equivalent to a lease by the telegraph company from the Frankfort and Southeastern Railroad Company of certain privileges for a time, and nothing more, and upon this theory arrives at the main conclusion in its opinion. This character of the contract seems to have been

assumed as beyond dispute, for there is no consideration whatever given in the opinion of the Circuit Court of Appeals to what this contract really does provide for the telegraph company.

This conclusion reached by the Court overlooks real stipulations and the real character and legal effect of this agreement

The contract in its recital contains a clear statement of the purposes of the contracting parties as follows:

"WHEREAS, the railroad company owns and operates a railroad between Frankfort and the western terminus of the Toledo, Ann Arbor and Northern Michigan railroad near Copemish, in the State of Michigan, *along which railroad and any extensions or branches thereof, it is proposed that a telegraph line shall be constructed, maintained and operated.*"

"NOW, THEREFORE," etc.

The contract then provides in the first and second paragraphs for the supply of material and labor for the original construction of the line, and the subsequent maintenance of the line, and in what proportions the materials and labor should be furnished by the contracting parties.

The third, fourth, part of the fifth, sixth and seventh paragraphs relate to the division of the uses of the line thus constructed as between the parties.

The eighth paragraph is an agreement to make the right to construct telegraph lines on this railroad an exclusive one so far as the railroad company could legally make it such.

The ninth provides for a mutual release of damages from neglect of employes.

The tenth assures the railway company the use of patents owned by the telegraph company, so far as the same may be necessary to properly carry on the busi-

ness of railroad telegraphing on the line of the railroad.

The Eleventh paragraph is as follows :

" It is mutually understood and agreed that the telegraph line, poles, wires and fixtures covered by this contract shall be the property of the telegraph company and shall form part of its general telegraph system, and shall be controlled and regulated by the telegraph company, which shall fix and determine all tariffs for the transmission of messages, and all connections with other lines and interests."

The twelfth paragraph provides that

" The provisions of this agreement shall extend to all railroads now owned, leased, controlled or operated, and to all railroads hereafter owned, leased, controlled or operated, by the railroad company, or by any company or corporation in which the railroad company, or by any company or corporation, in which the railroad company, may own a majority of the stock, or whose action it may be able to control by ownership of stock or otherwise, and the provisions of this agreement shall be and continue in force for and during the term of twenty-five years from the twenty-fifth day of September, 1890," etc.

This contract is construed by the Circuit Court of Appeals as being in all respects a mere personal contract terminable by the foreclosure of the mortgage.

This is, we submit, a fundamental misconception of the purpose and scope of the contract.

Notice that the expressed purpose of the contract is stated to be the construction, maintenance and operation of a telegraph line along the railroad, and any extension or branches thereof. It is a matter of which this Court will take judicial notice that every railroad needs as an adjunct to its successful operation a telegraph line. If this were not so, the provisions of this contract clearly show that it was deemed necessary

for this railroad to have a telegraph line in its operation. This line by the eighth paragraph was to be the only one on the railroad. Whether this eighth paragraph was valid or not as to excluding other telegraph companies from the right of way of the railway there is nothing invalid in the restrictions the railroad company thereby imposed upon itself during the period of the contract. It could not itself during the continuance of this contract build and operate its own lines. By the eleventh clause of the contract it is explicitly provided that the telegraph line, poles, wires and fixtures belonged to the telegraph company, and formed part of its general system of lines. It is also to be noted that while the railroad company itself could not under the eighth clause construct a line of its own during this contract, yet the telegraph company was under contract obligation to carry out the terms of the agreement to the very last day thereof in all its parts. No provision is made in the contract for the removal of any of the property either before the expiration of the twenty-five years or after it. That it should not become the property of the railroad company was provided against by the explicit terms of the eleventh clause of the contract. The railroad company did not contemplate a cessation of the operation of its railroad at the end of the twenty-five years. It would need a telegraph line then as much as before that time. Temporarily, at least, it would be dependent upon the telegraph line to be built under the agreement, even if it was contemplated that all rights of the telegraph company upon the line of the railway would cease at the end of twenty-five years with the bare right to remove the poles, wires and fixtures as its personal property.

Such temporary use by the railway company is, however, inconsistent with the thought of the removal of the line upon the end of the twenty-five years.

A consideration of all these features of this contract must, we think, satisfy any one that the contracting parties were not arranging for an occupancy upon this railroad for simply a term of years of the railroad by a telegraph line, and then the telegraph company's rights should cease, but they were proposing to have "*constructed, maintained and operated*" there a telegraph line which it was expected would be as indeterminate in its duration as the railroad itself. For it is to be remembered that the telegraph apart from its use by the railway company is as much of a public agency, and fulfills a public demand as important as the railroad itself. The poles, wires, instruments and batteries constitute a plant for public uses as much as the railroad itself.

It is no objection to this construction of this agreement that some of the provisions of the agreement terminate in twenty-five years. It will not be denied that the provisions as to cost of material, division of the uses of the lines and wires when constructed, the division of cost of maintenance, are temporary, and terminate in twenty-five years. So the provision in the eighth clause making the right of way exclusive so far as the railway company legally might.

The case of City of Los Angeles vs. Los Angeles City Water Company, 124 Cal., 368, is instructive upon the question as to whether this contract was a lease or not. The syllabus of the case is as follows :

"Agreement to pay for improvements.—Expiration of Contract.—Right of possession.—Tender.—Where the water company receives possession under the con-

tract of a small line of wooden pipes and agreed to construct iron pipes throughout the city, and build new water-works, as the demands of the city required, and at the expiration of thirty years to return the whole to the city 'upon payment to them of the value of the improvements made,' *et cetera*, which the city agreed to pay, the contract is not one of lease; but whether so considered or not, the rights of the parties at the expiration of the contract are fixed by its terms, and not by legal implication; and the city cannot reclaim possession from the water company without first paying or tendering the value of the improvements.

"Right to water rates.—Receiver.—Injunctoin.—The city not having paid or tendered the value of the improvements, and having no right to the possession of the works and no rights in the contracts between the water company and the ratepayers, and being adequately protected by the value of the improved water-works, cannot, through the appointment of a receiver and by means of an injunction, prevent the water company from receiving payment of water rates after the expiration of the period fixed by the contract.

"Rights of water company.—Mortgagee in possession.—The water company is substantially in the position of a mortgagee in possession, having a lien on the property involved as security for the performance of the covenants of the city contained in the contract, and without tender or payment its possession should not be disturbed or a receiver appointed.

"Injunction against city.—The water company, not having an adequate remedy at law, may enjoin the city from using its municipal power to take forcible possession of the waterworks."

In the above case McFarland, J., delivering the opinion of the court, says, at page 379:

"The city undertakes to contend that the contract is a lease pure and simple; and, as the contract according to the city's contention must be thrown into the category of a 'lease,' it contends for one of the well-known features of a lease of land; to wit, that at the expiration of the term the lessor has an immediate right of re-entry and possession. This position is not tenable. The written instrument in question cannot be categoried into any smaller class than that of a

'contract.' It is a contract with many and various covenants. It was not called a lease (however suggestive that might have been) by the parties who made it. The city entered into a contract by means of an ordinance, which was entitled, 'An ordinance contracting for the care, maintenance and improvements of the city waterworks.' The first section says that 'the contract' hereinafter set forth, *et cetera;* the second section describes it as 'this agreement;' it was afterwards said 'that at the expiration of the period of thirty years from the execution of this instrument they will pay,' *et cetera;* in another part of the instrument it is called 'this contract and ordinance;' in another place it speaks of 'the terms of this contract;' in another place it speaks of 'the approval of this contract.' The only place where there is any reference whatever to the contract as a lease is the agreement that the party of the first part will 'make no other lease, sale, contract, grant or franchise to any person or persons;' and this language can as well be construed as designating the instrument a 'sale, contract, grant or franchise' as designating it a 'lease.' In the opinion of the court below it is well said as follows: 'I do not perceive any theory which justifies the contention that the agreement is a lease as to the pipe lines, flumes and other "improvements" constructed by the water company. Manifestly, the city could not lease what it never had, and the present distributing system did not exist at the time the agreement of 1868 was executed. In fact, the system then existing has been entirely superceded and constitutes no part of the present plant. Neither can it be said with any show of reason that the distributing pipes and reservoirs constructed by the water company constitute improvements on the leased property and revert therewith and as a part thereof upon the termination of the lease." The instrument in question could as well be called a "contract of purchase," with all the incidents of such a contract following, as a "lease." It is, in fact, a contract by which the city agreed to give immediate possession to the water company of a small line of wooden pipes which the city then owned, and to allow it to build new water works throughout the city as necessity demanded, with covenants on the part of the water company that it would change what little the city had then in the way of waterworks into better ones, and would create new

works as fast as the demands of the city required; that the water company should have the right to do this and to collect water rates for a period of thirty years in consideration of the covenants entered into by the water company, and that upon the expiration of thirty years the city would pay the company for all the works which it should have created, and that the water company, upon payment therefor, should then deliver possession of all the waterworks, as they should exist at the end of the period, to the city. The rights of the parties do not rest upon legal implications; they are determined by covenants expressly stated in the contract. These are that the city should pay for the works to be created by the water company; and that the company should deliver possession thereof to the city "upon the payment to" it of the value of such property. There is no agreement, express or implied, that the company should yield up possession before payment. Even in the case of a strict lease of land, where the lessee is to erect improvements to be paid for by the lessor at the expiration of the term, the lessor is entitled to possession at the end of the term without payment, leaving the tenant to his action to recover the value only where there is no express agreement in the instrument which changes the result that flows by implication from the mere nature of a lease; in such a case, if the clear meaning of the contract is that the lessor is to have possession only upon payment, then he has no right to possession prior to payment. Such a case is presented in Swift vs. Sheehy, 88 Fed. Rep., 924. There the court say: "There is in this contract, distinguishing it from the cases principally relied upon by the defendant's counsel, an express provision that the lessor can only become the owner of and entitled to the possession of the buildings and improvements upon the payment to the lessees of the value thereof. * * * At common law, under a contract of lease by which the lessee was permitted to make improvements upon the land during the existence of his lease, without further express reservation as to the termination of the term, the improvements went with the land back to the lessor. The contract in question does not only require the lessor, at the termination of the lease, to pay the lessees the value of the improvements, but it, in effect, entitles the lessees

to retain the ownership and posession until the lessor shall pay them therefor."

But the case of National Waterworks vs. Kansas City, 62 Fed. Rep., 853, decided by Judge BREWER, more nearly approaches the case at bar than any to which our attention has been called. In that case the contract between Kansas City and the waterworks was very similar to the one in the case at bar. There the contract ran for twenty years; the water company was to create waterworks, which the city was to have at the expiration of twenty years upon payment of the value; and a trial court had held that at the end of the twenty years the city was entitled to take possession of the waterworks without payment. But the circuit court of appeals reversed the case; and Judge BREWER, in delivering the opinion of the court, among other things, said: "We dissent *in toto* from the claim of the city that at the lapse of the twenty years the title to this property, with the right to possession passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation as best it could. * * * Now, the familiar and ordinary law of business transactions is that he who parts with title receives at the time payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provided that no grant so made shall confer the right to operate the water works for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of twenty years the city shall purchase and pay therefor. * * * In so far, therefore, as the decree of the circuit court attempts to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous." Our conclusion therefore is, both upon principle and authority, that the city at the expiration of the thirty years, had no right to

the possession of the water works without payment, or tender of payment, of their value."

In the case at bar the express provision of the contract is that "the telegraph line, poles, wires and fixtures covered by this contract shall be the property of the telegraph company, and shall form part of its general telegraph system." Either this is a definite covenant of the ownership of this property for all time or it is limited by the term of the contract. There is, however, nothing whatever in the contract to indicate the latter. Nor is there anything whatever to indicate that it was the thought of the parties to the contract that this telegraph line would cease to exist along and upon this line of railway as indicated in the recital of the agreement.

In the argument in the Court below there was the suggestion that it was claimed by the Telegraph Company that the eighth clause was intended to be a grant of a right of way, and was alone relied on as such by it.

If the eighth clause had never been in the contract, still, we insist that the remaining provisions of the contract would clearly evidence an intent to grant a right to construct a telegraph line along the railway, and would constitute the grant of such right. The eighth clause of the contract is not so much a grant of the right of way along the railroad, (for that is necessarily implied in the remaining provisions for the construction, maintenance and operation of the telegraph line), but it is a specific stipulation in the nature of a regulation of the right of way granted—a limitation on the power of the railway company to grant to other companies a similar right. As

we have said, if this clause be entirely stricken from the contract, a right of way along the railway is necessarily implied from the other provisions, and the expressed purpose of the parties in entering into the contract. The Circuit Court held that the grant of right of way to the telegraph company was merely incidental to the mere personal agreement of the parties, and to enable that personal agreement to be carried out. But this construction contravenes the purpose of the parties, as expressly stated by them in the agreement. They express their main purpose in the words, "along which railroad and any extensions or branches thereof it is proposed that a telegraph line shall be constructed, maintained and operated."

A telegraph line requires a right of way and lands for the support of poles and wires. This is clearly recognized by the statutes of Michigan. In the Act of 1871 of that state, by Section 5 authority is given to a Telegraph Company organized under that act to enter upon and construct and maintain lines of telegraph through, along and upon any of the public roads and highways, or across or under any of the waters within the limits of the state, and to erect the necessary fixtures for sustaining the wires of such lines. By Section 6 of the same act it is provided that any person over or through whose lands said lines shall pass, or upon whose lands the piers, posts or abutments shall be placed, may make application to the Circuit Court, and thereupon a commission shall be appointed to fix the damages. This is, in other words, an appropriation proceeding similar in all essentials to the proceeding to value right of way for a railway company.

In the act of 1846, as amended in 1873 (Sec. 3686, Revised Statutes, Edition of 1882), Section 1 provides

"that any person or persons may be and they are hereby authorized to construct and maintain lines of electric telegraph, together with all necessary fixtures appurtenant thereto, from point to point upon and along any of the public roads, highways or railroads, and across, along or under any of the waters, rivers or bridges within the limits of this state, and upon or over any of the public lands of this state, or upon or over the land of any individual—the owner of any land through which said telegraph line may pass, and railroad corporation on whose right of way the same may be constructed, having first given consent."

This telegraph line was as much realty as the railway itself. It requires for the support of its poles and wires either an ownership in fee of a right of way, or an easement therein.

Upon this is put permanent structures to support wires. Such a line has been held to be realty.

Am. Un. Tel. Co. vs. Middleton, 80 N. Y., 408.

It is capable of being mortgaged as real estate. Indeed could not be mortgaged otherwise.

Boston Safe Dep. and Trust Co. vs. B. & M. Tel. Co., 36 Fed. Rep., 288.

In the case at bar, therefore, the railroad company granted a right of way out of its real property and upon this the telegraph company constructed its telegraph lines. The property conveyed, it is true, was mortgaged, but that does not prevent the grant of the right of way from being valid, subject to the lien of the mortgage. Under the Act of Congress of July 24th,

1866 (Rev. Stats., Sec. 6253 *et seq.*, 14 Stats., 221), it is provided

'that any telegraph company now organized or which may hereafter be organized under the laws of any state in this Union shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military and post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams or waters or interfere with the ordinary travel on such military or post roads."

The bill sets forth in its sixth paragraph the rights claimed under this act and also that it is admitted that the complainant had duly accepted its provisions long prior to the contract of September 25th, 1890. When, therefore, in that contract it contracted for the right to construct its telegraph lines upon this railway, and provided that the use of that line might be enjoyed by the railway company up to the last day of the period named in the contract, and that this line was to be the property of the telegraph Company and form part of its general system of telegraph, it must be considered that it was doing this with a view to the obligations defined in the Act of Congress to the Government of the United States. This contract must be construed in the light of these undertakings. These considerations very strongly enforce the conclusion heretofore urged that in entering into the contract of September 25, 1890, the parties did not contemplate a mere temporary occupancy of the railroad by the telegraph, ending with the 25 years, but something more permanent than this, although

they only defined the terms of such occupancy for the period of 25 years. In the opinion of TAFT, J., it is stated that it was necessary to have an arrangement under the Act of Congress of July 24th, 1866, before a telegraph company could occupy the right of way, citing Telegraph Co. vs. Telegraph Co., 96 U. S., 1 (Record, p. 44). But this contract was such an arrangement as under the Act of Congress the owner of the railway was at full liberty to make. We shall show later by authorities, the mortgagor in possession was the only one with whom it could be made in September, 1890.

II.

The Circuit Court of Appeals erred in holding that the Circuit Court as a Court of Equity had no power to grant such a decree as would afford full relief to both parties to the litigation.

The Telegraph Company, while insisting that it has full power to continue to maintain and operate its telegraph line upon this railway, does not claim for a moment that it can do so freed from any obligation to the defendant. While it contracted with the owner of the railway, yet what interest it acquired was subject to the mortgage existing upon the property. The situation of the parties in view of the contract, the foreclosure of the prior mortgage, and the Act of Congress, was this. The contract granted a right to con-

tract, maintain and operate a telegraph line, which was built.

The Act of Congress gave to the telegraph company all the public right which Congress could grant for the construction, maintenance and operation of this public agency, but provided no method of acquiring the private right of property needed, on which to locate and construct the line of telegraph. The Act of Congress necessarily implies power on the part of the owner of the railway to make some arrangement with the telegraph company for the use of this private property needed to construct the telegraph line. The telegraph line had, however, in this case, been constructed, but upon property subject to the mortgage. This mortgage had been foreclosed, and the mortgagees had purchased it, and conveyed to the defendant.

Under these circumstances is it true as the Circuit Court of Appeals held that a Court of Equity is powerless to so frame its decree as to protect the rights of all parties, or must it say that the only remedy it can furnish is to stand aside, and allow this telegraph line to be dismantled, and the wires, poles, batteries and instruments removed by the telegraph company? As such they are worth little more than the cost of removal, and would be of little use elsewhere. Such was evidently never the contemplation of the parties to the agreement, and such a result should not be caused at the instance of a mortgagee unless necessary to the protection of his rights. In the cases cited in the opinion of the Circuit Court of Appeals, where the controversy was wholly between individuals, no other rule than that announced would fully protect the rights of the parties. In the case at bar the

parties to the contract are not mere private individuals, but are charged with obligations to the public, and the Court can so frame its decree as to enable those duties to be discharged, and the private right protected at the same time. This, we insist, there is no difficulty in doing.

If the parties were mere private persons, having no public relations and obligations, the question would be easily answered by the simple suggestion that the mortgagee could foreclose his mortgage, and upon the foreclosure sale certain well-settled principles would apply. But when we come to deal with two corporations, both public in character, agencies of the General Government and of the public, as instruments of commerce, both State and interstate, very different considerations arise. It was not competent for the State of Michigan, by a prohibitory statute, to prevent the Western Union Telegraph Company from constructing its telegraph line along the Frankfort and Southeastern Railroad. The Telegraph Company did not need any enabling legislation from that State in order to have the full legal right to operate and maintain its telegraph lines along this railroad. All it needed was in some way to acquire the right of way for these lines from the owner of the soil. This it secured by the contract, so far as the railroad company was concerned. Its right thus obtained was incumbered by the mortgage. The interest of the mortgagee was not valued and paid for, and equitably the utmost the mortgagee is entitled to is the compensation for the interest thus acquired by the Telegraph Company which by the aid of a statute might be condemned and valued.

The suggestion may be made that, while this is true, yet the Act of Congress has not provided a method for

condemning the property, and ascertaining the damages, or the exercise of the right of eminent domain by the telegraph company, nor has the State of Michigan provided a method, and therefore these considerations can have no force and no weight. The question then recurs whether in the view of a court of equity, the Western Union Telegraph Co. being charged with public duties and responsibilities, and not having the power by law to condemn, the Court is not competent to so frame its decree that the public interest will be advanced and at the same time the private right be fully protected. In other words, whether the proper view to take of the situation of the parties here is not, if the assignee of the mortgagee wishes to repudiate this contract, and not be bound by any of its provisions, that then the ultimate of its rights is that its interest in this property which will be taken by the telegraph company will be valued, as upon an appropriation, and it will be given the right to full compensation, and that thereupon the telegraph company will be permitted to continue its occupation, and enjoyment of the easement granted by the Frankfort and Southeastern Railroad Company.

The right of a court of equity under circumstances similar to this to frame its decree so as to protect both the public right, and the private property right is very clearly set forth in the case of McElroy vs. Kansas City (21 Fed. Rep., 257). In that case the complainant was the owner of a lot on the corner of two streets in Kansas City. The grade had been established by the city by an ordinance, the carrying into execution of which would leave the lot of the complainant many feet above Sixth street, and seriously damage the value of the property. Under the Constitution of Missouri it was

provided that private property should not be taken or damaged for public use without just compensation. The Legislature had made no provision by which the city could proceed to ascertain the amount of the damage in a case of this character, and it was insisted on the part of the complainant that the provision of the Constitution was not self-executing, and that the city, having no statutory authority to condemn, or to ascertain the amount which its operations would damage the lot in question, was powerless to proceed, and that the only thing for the Court to do was to grant a perpetual injunction against the city's action, and thus tie up and prevent a great public improvement until the Legislature could act. It will be observed that there was not here, as in the case at bar, great public interests involved in the way of intercommunication, and action on the part of an agency of the Federal Government, but simply the question of the action by one of the municipal subdivisions of the State affecting a small section of the public. BREWER, then Circuit Judge, lays down the following general propositions as controlling in the decision which he reached (p. 261):

"FIRST. A Chancellor, in determining an application "for an injunction, must regard not only the rights of "the complainant which are sought to be protected, "but the injuries which may result to the defendant or "to others from the granting of the injunction. If the "complainant's rights are of a trifling character; if the "injury which he would sustain from the act sought "to be enjoined can be fully and easily compensated, "while, on the other hand, the defendant would suffer "great damage, and especially if the public would suffer "a large inconvenience if the contemplated act was "restrained, the lesser right must yield to the larger "benefit; the injunction should be refused, and the "complainant remitted to his action for damages. This "rule has been enforced in a multitude of cases, and "under a variety of circumstances, and is one of such

" evident justice as needs no citation of authorities for
" its support.

" SECOND. When the defendant has an ultimate right
" to the act sought to be restrained, but only upon
" some condition precedent, and compliance with the
" condition is within the power of the defendant, in-
" junction will almost universally be granted until the
" condition is complied with. This principle lies at
" the foundation of the multitude of cases which have
" restrained the taking of property until after the pay-
" ment of compensation, for in all those cases the
" Legislature has placed at the command of the de-
" fendant means for ascertaining the value of the prop-
" erty. In those cases the courts have seldom stopped
" to inquire whether the value of the property sought
" to be taken was little or great, whether the injury to
" the complainant was large or small, but have con-
" tented themselves with holding that, as the defend-
" ant had full means of ascertaining such compensa-
" tion, it was his first duty to use such means, deter-
" mine and pay the compensation, and until he did so
" the taking of the property would be enjoined.

" THIRD. Where the defendant has an ultimate right
" to do the act sought to be enjoined upon certain
" conditions, and the means of complying with such
" conditions are not at his command, the courts will
" endeavor to adjust their orders so on the one hand
" as to give to the complainant the substantial benefit
" of such conditions, while not restraining the defend-
" ant from the exercise of its ultimate rights. Thus,
" in the case at bar, the defendant has of course the
" ultimate right to grade this street. As a condition
" of such right is a payment of damages, but it has no
" means of ascertaining those damages; no tribunal
" has been created, no provision of law made, for their
" ascertainment. Hence, if possible, the Court should
" provide for securing to the defendant this ultimate
" right, and at the same time give to the complainant
" the substantial benefit of the prior conditions.

" FOURTH. In applying the rule first stated to a case
" like the one at bar, the Court should have principal
" regard to three matters:

" (1) The amount of injury to the complainant. It
" is obvious that a grade of a single foot in front of a
" city lot would work but trifling injury, while on the
" other hand the grade might be such as practically to
" destroy the value of the adjacent property. In the

" one case it would seem a great hardship to tie up " public improvement because of some trifling injury " to the complainant, the amount of which injury was " not attainable by any established means, and there- " fore that the party might justly be left to his action " for damages; while in the other case the Court might " well insist that the value of complainant's property " should not be wholly wrecked until such value has " been paid to him.

" (2) The Court will consider the solvency of the " defendant. If some irresponsible corporation should " seek, in the exercise of the power of eminent do- " main, and under the guise of the contemplated pub- " lic improvement, to do serious damage to property, " the Court should promptly say that the owner was " not bound to take the chance of collecting his dam- " age from such a corporation, and imperatively re- " quire the prior adjustment and payment of such dam- " ages; while if the party attempting the improvement " was a corporation of established and permanent solv- " ency, the Court might say that the complainant " would run little risk in pursuing simply his action for " damages.

" (3) If the improvement was one of great public " importance the Court would justly regard that as a " reason for not lightly interfering with the work, while " if the improvement was more of a personal specula- " tion and for private gain, the prior protection of the " complainant would be most rigorously insisted on. " Thus, if in the centre of a large and thriving city like " the defendant, some improvement was contemplated " which the necessities of busines proclaimed to be " urgent, the Court on no slight consideration should " interfere to delay or restrain it; while, on the other " hand, if it was some matter in the outskirts of the " city, having obviously principal reference to the pri- " vate speculation of the individual, and of no earnest " or urgent demand of public good, the attention of " the Court would be properly directed to the full pro- " tection of the complainant's prior right. I think " such considerations as these, and others of a similar " nature, when properly regarded by the Courts, will " afford ample protection to individual rights without " unnecessary interference with needed public im- " provements; and that, until the legislature makes " suitable provision for the ascertaining of damages to " property not taken, the Courts should be guided by

" them in determining all applications of this nature
" for an injunction.

" Now, looking at the facts of this particular case, it
" is evident that the injury to complainant's lot will be
" serious; that the solvency of the defendant is un-
" questionable, and that any judgment for damages
" against it can be easily collected; and also that the
" improvement is not one of pressing public necessity,
" but in the outskirts of the city, and having reference
" mainly to private benefit and individual speculation.
" I think, therefore, that the complainant is entitled to
" a restraining order, but at the same time it should
" not be absolute and unconditional."

" The section of the Constitution provides that this
" compensation shall be ascertained by a jury or Board
" of Commissioners of not less than three freeholders.
" It is within the power of a Court of Chancery to pro-
" vide a Board of Commissioners. The order, there-
" fore, will be that upon the giving a bond in the sum
" of $3,000, and the filing of a stipulation to accept
" such damages as shall be ascertained in the manner
" herein provided in full satisfaction of all claims
" against the defendant, the defendant will be restrained
" from grading said street.

" Provided, that at any time the defendant may, upon
" 20 days' notice, apply to either of the Judges of this
" Court for the appointment of a Board of Commission-
" ers of three freeholders to ascertain and report the
" amount of damages which complainant will sustain
" by reason of the grading of said street, and upon the
" payment of the damages so reported by such com-
" missioners the injunction will be vacated."

The principles of this case are approved by this Court in Osborne vs. Missouri Pacific Ry. Co., 147 U. S., 248. See language of opinion by FULLER, Ch. J., pages 259 and 260.

Other notable instances of similar decrees by a court of equity will be found in the elevated railroad litigation arising in New York City.

In these cases the Court, acting as a Court of Equity, ascertained the value of the easements taken by the elevated railroad company, and decreed that

upon the payment of such sum, an injunction should issue restraining the railroad company from continuously trespassing upon pla ntiff's property, and also requiring the owner of the property to execute a deed to the railroad company upon the payment of the money.

Galway vs. Elevated Railroad Co., 128 N. Y., 132.

Shepherd vs. Elevated Railroad Co., 117 N. Y., 442.

Perhaps a hundred cases in New York applying these principles have been adjudged. The Reports of the New Yorks Courts are full of them.

In these cases the valuations made by the Courts are made upon the same principle that a condemnation award would be made. That is, how much has the property owner been damaged by the taking for the purposes of the elevated railroad of his easements of light and air. In other words, how much less valuable is the property in consequence of the building of the elevated railway and thereby taking a portion of the property of the abutting owner. This is made quite clear in the opinion in Shepherd vs. Manhattan El. R. Co., cited above. GRAY, J., says (p. 448):

"The present action was necessarily one on the equity side of the Court, as the main relief sought was the injunction against the defendants. The decisions of this Court have settled the rights of abutting property owners to an easement in the street, occupied by the defendant's structure, for free egress and ingress and for the free admission of light and circulation of air. That easement is property and constitutes an interest in real estate, and because the defendant's railroad was a use of the street, not originally designed, and was an appropriation to themselves of property rights, it cannot be maintained without compensation being made to the abutting owners for the injury in-

flicted upon their property and rights ; and for the annoyance, caused through the operation of the road, to the abutting owners, in their enjoyment of the use of their property, they are entitled to recover such damages as may be shown to be the result of defendant's acts (Story vs. Elevated R. Co., 90 N. Y., 122 ; Lahr vs. New York Elevated R. R. Co., 104, *Id.*, 268). Although property owners have a remedy at law for the intrusion upon their rights, yet, as the trespass is continuous in its nature, they can invoke the restraining power of a Court of Equity in their behalf, in order to prevent a multiplicity of suits, and they can recover the damages they have sustained as incidental to the granting of the equitable relief (Williams vs. N. Y. C. R. R. Co., 46 N. Y., 97 ; Henderson vs. N. Y. C. R. R. Co., 78 *id.*, 423). The violation of the property rights of abutting owners being adjudged in such an action, the awarding of damages, sustained in the past from the defendants, follows ; they being, on equitable principles, deemed incidental to the main relief sought (Story Eq. Jur., 794, 795, 799)."

The relief thus accorded to the parties in these suits is in all respects a condemation in a court of equity. The fictions indulged in, in describing it, in no way change its essential character. The elevated railway is built in the street ; the easements are taken ; and the Court values them as though it were a Commission appointed under the statute. It says to the railway company, pay this amount, or allow an injunction to issue. It says to the owner of the property, make a conveyance of the easements to the elevated railway company upon the payment of the amount of this valuation. Thus the rights of both parties are fully protected, and the easements are, in fact, condemned to the use of the elevated railway. This power is, however, denied by the Circuit Court of Appeals to exist in a Court of Equity (Record, p. 44).

See, also,

Phillips vs. Thompson, 1 John's Ch., 131.

Law of Eminent Domain, Randolph, Secs. 384, 385, and cases cited.
Dows vs. Congdon, 16 How. Proc. Rep., 571.
North Hudson R. R. Co. vs. Boorason, 28 N. J. Eq., 450.

To illustrate our contention fully, suppose instead of the telegraph company being one party to the agreement, the other party to the agreement had been a railroad corporation which had made an arrangement for the use of a portion of the Frankfort and Northeastern Company's right of way for its track, and had constructed at great expense, and was operating at the time the foreclosure of the mortgage took place, its railroad thereon. Can it be contended for a moment that the mortgagee or purchaser at the foreclosure sale not having made that railroad company a party to its foreclosure could summarily take possession of its railroad, and oust therefrom the operating railroad company as the defendant sought to do the telegraph company in this case? Would not its remedy be either to foreclose its mortgage as against this railroad company, making it a party to the foreclosure, thereby giving it a right to redeem, and if it did not redeem, cutting off all the rights in the premises by a proper decree; or else by a proceeding under the statutes to have its interest in the property taken by the railway company, properly condemned and valued, and the amount of the valuation secured to it?

Mills on Eminent Domain, Sec. 74, and cases cited.
Lewis on Eminent Domain, Secs. 324 and 628.

None of the authorities which we have found have

gone to the length of holding that, under circumstances of that character, an action of ejectment would lie to enable the mortgagee or purchaser at foreclosure sale to obtain possession of the property in cases where the property had been acquired by contract or condemnation by a company having a right to make appropriation, and a mortgagee had not been made party to the proceedings to condemn. In such cases the interest of the mortgagee is not taken away from him by the proceedings to condemn, but the remedy of the mortgagee is, not to take possession of the property condemned, but to have his interest in the property valued, and the valuation paid to him. The Court below, therefore, in decreeing, as was done in this case, the entire destruction or cessation of any rights in the Western Union Telegraph Company along and upon this railroad of the Frankfort and Southeastern Railroad Company, has wholly lost sight of the important functions which this telegraph company was endeavoring to discharge to the United States Government and to the public by the construction of this line of telegraph along this railroad. It ignored entirely not only the express grants of the right of way and the right to construct a telegraph line thereon, contained in the contract, but also the public character and the public duties of the telegraph company, and that in the construction of the telegraph along the railroad it was exercising a right secured to it by the Act of Congress of July 24, 1866, and that all that it needed to enable it to construct its line of telegraph was the acquisition of the private right of way from the railway company ; that it had already granted to it by the Act of Congress what

could not be taken away from it by the Legislature of Michigan or affected by the legislation of that State, the full corporate power to construct this line of telegraph as a public agency.

The whole theory of the opinion of the able and learned Judge below upon which the decree is based, and of the Circuit Court of Appeals, is that the telegraph company's rights in and to the railway were personal. That it had by the contract secured the right to place a few poles and wires upon the railway and upon the expiration of the contract had only a license to enter and remove them. But this is at entire variance with the entire scheme of the contract, and with the essential nature of a telegraph line.

A court of equity, in dealing with the subject, will therefore consider the telegraph company in building and maintaining this line, as being not in any sense dependent upon the railway company, but in the performance of this public function as an independent public agency. The provisions respecting the use of the lines as defined in the contract of September 25, 1890, were merely temporary provisions separate and independent from the other provisions of the contract by which there was assured to the telegraph company a right of way and a right to maintain existing lines and to construct additional lines upon and along the railway.

Therefore, under the most favorable view of the defendant's claim, the decree should have simply enjoined the defendant from interfering with the property of the complainant, and provided a method for ascertaining the value of the interest of the mortgagee in the rights granted to the telegraph company by the contract, and

making the injunction conditional upon the telegraph company compensating the mortgagee for such rights.

There is a clear distinction between the power of a court of equity in a case where a telegraph line is already built, and the Court is appealed to to settle the rights of the parties, and the case where the line is not yet constructed. A court of equity could not entertain a bill to condemn a right of way along a railway for a telegraph line, although it has full power, as we contend, to adjust the relations of the telegraph company with the railway company after the line of telegraph is built. The Court of Appeals overlooked this obvious distinction in deciding this case.

See

A. & P. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 541.

W. U. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 419.

W. U. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 558.

W. U. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 581.

The courts make a clear distinction between public or *quasi* public corporations in the occupation of lands, and mere private individuals. The same act of trespass or occupancy is attended with very different results in the two cases.

In California Railroad Company vs. Southern Pacific Railroad, 20 Am. & Eng. R. R. Cases, 309 (advance case of California, decided May 22, 1885), we have a case of a proceeding by one railroad company against another to ascertain the compensation for a crossing, and also to acquire lands for depot purposes. In this case, the court say in the opinion :

"There was evidence of consent by the defendants to the entry and building of the road by plaintiff on sections of land 7, 19, 21 and 33, and that the entry of plaintiff and its acts were not trespasses. The value of the ties, rails, etc., were not therefore to be considered as part of the realty in determining the compensation to be awarded for the lands taken (Cal. S. P. R. R. Co. vs. Armstrong, 46 Cal., 90).

In Toledo, Ann Arbor & Grand Trunk Ry. Co. vs. Dunlap *et al.* (Advanced Case, Michigan, January 5, 1882) 5 A. & E. R. R. Cas., page 378, we have a proceeding for condemnation, in which a railroad company had constructed its road over property of the defendants without authority from the owners in fee, having, however, a license to do so from the holder of a contingent dower interest. The question arose upon the assessment of damages as to the elements to be considered in the value of the land. CAMPBELL, J., in the opinion rendered in the supreme court upon appeal, says:

"We are of opinion that no error was committed in excluding from the compensation allowed Dunlap the value of the railroad track laid upon the land. We think the case cannot be distinguished from Morgan's Appeal, 39 Mich., 675. The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel, and it would be absurd to apply to land so used and to the railway track laid upon it the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in the case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending possession, and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose, there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have for a tortious occupancy previous to these proceedings, or whatever rights of property he might have in case the

company abandoned the road entirely and left the track untouched, we think that, so long as it is in possession and legal measures are proceeding to secure a right to retain it, that this structure belongs to the company whether intruders or not."

In the case of Morgan's Appeal referred to by Justice CAMPBELL (39 Mich., 675), commissioners were appointed under the statute of Michigan to assess damages to Morgan by reason of taking of his land by the Chicago and Northwestern Railroad Company. The land was situated in the outskirts of the city of Lansing; the appellants Morgan resided in the city of New York, but had an agent at Lansing whose duty it was to pay taxes, and guard the land against unlawful intrusion. In 1876 the company made entry upon the land, built their road, and occupied for the purpose of their track between three and four acres, and placed about forty feet of a large bridge upon the land. While it thus occupied the land it made efforts to acquire the land by private and amicable means, and the company proceeded with its improvements, believing that such efforts would be successful. The efforts, however, failed, and proceedings were instituted to secure condemnation in the probate court under the Michigan statute. The commissioners appointed reported the amount of compensation due from the company, which did not include the improvements the company had made upon the land, but simply the value of the land exclusive of the track and bridge. The owners of the land objected, and on appeal insisted that the improvements on the land should be valued. GRAVES, Justice, in the course of the opinion, says:

"The first objection is that the commissioners refused to allow appellants (Morgan) for the road itself

and part of the bridge constructed by the company prior to these proceedings. These works cost between seven and eight thousand dollars, and appellants contend that the company in making them on the land acted without authority, and simply trespassed, and the works became fixed and incorporated with the land and were required to be considered as part of it and in the appellants' ownership for the purpose of estimating their damages. There is no basis in law or equity for this claim. It is not consistent with a fair interpretation of the stipulation for the creation of the commission, nor reconcilable with the actual attitude the parties bore to each other whilst the work was going on. The company did not act wantonly or oppressively. They had reasonable expectation of getting the right of way on private terms and without difficulty. But it is not intended to rest upon such considerations.

"The proceeding is not an action by appellants to recover damages for past trespasses, nor an ejectment on their part to compel the company to restore possession, and as incidental thereto to forfeit the erections constructed in their own wrong.

"The nature of it is different. It is no part of its object to compel the company to sacrifice the cost of its works upon the land either by enforced abandonment on the one hand or enforced payment of the value to the land owners on the other. It is a proceeding by the company to secure in a lawful way the right to take and use the land, a right not previously obtained, and the only terms the law imposes, in case the taking and use are sanctioned, is the payment of such 'damages or compensation as ought justly to be 'made.' Certainly it would not be 'just' to require the company in this proceeding to pay the appellants for the identical works the company have constructed in order to carry out the specific use and purpose for which the land is required."

In Greve vs. St. Paul & Pacific R. R. Co. (26 Minn., 66) a similar question was before the court of Minnesota, where a railroad company had wrongfully entered upon lands of the plaintiff, and upon a subsequent condemnation the question arose as to the right to include in the estimated value of the land the value of the property which the railroad company attached to the

soil. GILFILLAN, C. J., passing on the question, concludes his opinion as follows (p. 70):

"When the proceedings were commenced it does not appear; but it is not questioned on the argument that in taking possession of and constructing its road over the land it intended to make this a part of its general line, and ultimately to secure, in th manner prescribed by law, the right to retain the land for that purpose; and the company was operating under a charter which, in terms, authorized it to enter upon and construct and operate its road over the land in advance of making the compensation required by the constitution; although, notwithstanding this, the company was, under the decisions of this court upon the constitutionalty of this part of the charter, a trespasser in constructing its road over the land without first making compensation, we think these facts ought to be considered when the question between the company and owner is, What is just compensation to be made by the former to the latter for the taking?

"When we are not bound down by the technical rules of property, but may enter into consideration of what under the circumstances is just and equitable between the parties, we can see no reason for allowing to the plaintiff the value of the roadbed, ties and rails which the defendant has placed upon the land. The court below was right in excluding such value."

BERRY, J., concurring, says:

"I agree to the general conclusion arrived at by the majority of the court in this case—viz., that the plaintiff is not entitled to recover for the roadbed, ties and rails; but I dissent from the reasoning by which that conclusion is reached. I think with some modification the reasons given for an analogous conclusion by the Supreme Court of Pennsylvania, in Justice vs. Nesquehoning Valley R. Co. (87 Pa. St., 28), are much more sound and satisfactory."

In the case cited by Justice BERRY (Justice vs. Ry. Co., 87 Pa. St., 28), Chief-Justice AGNEW delivered the opinion of the court. It was a case where a railroad company was a trespasser upon the lands of Justice and others, having attempted to agree with the owners

of the land upon terms, but having entirely failed to do so before it entered upon the lands, and constructed this railroad. The proceeding came into court under a statute to view and value lands taken by the railroad company for its railroad, and to assess damages therefor and came into the supreme court by appeal from the finding of the viewers. Justice AGNEW, after stating the facts and stating that the entry was clearly a trespass and was irregular, that it subjected the company to an action of ejectment, in which judgment was first rendered April 3, 1874, and execution stayed until the proceeding to assess the damages should be completed, says:

"The company being a trespasser and the entry not in conformity to law, the question is whether this irregular proceeding operated as a dedication in law of the property in the ties and rails to the owners of the land, so as to entitle them to include these things in the assessment of the damages under the railroad law and to recover their value as an accession to the value of the land taken by the company. A careful consideration and analysis of the case before us will show that it differs in essential respects from that of a mere *tort feasor* whose structures upon the land of another enure to the benefit of the owner of the land.

"The common law rule is undoubted that a trespasser who builds on another's lands dedicates his structures to the owner. The reason is obvious, for like him who sows where he cannot reap, he can obtain no advantage by his wrong and having affixed his chattels to the realty they become part of it and he cannot add further injury by tearing them down. Even a tenant is to a modified extent affected by the same rule. If he improves under a covenant, the covenant governs his right of removal. So, if in favor of trade he erects structures for his business, doing no unnecessary or irreparable injury to the land, yet having done this without consent, he must remove his erections before the expiration of his term, otherwise he will be presumed to dedicate them to his lessor. There is also to be noticed a clear distinction between putting

down a railroad track under a lease and an act of appropriation of the land under a charter. This is clearly pointed out in Heise vs. Penn. R. R. Co. (12 P. F. Smith, 67). The very intent of an appropriation of land is to place upon it and own and use the structures necessary to carry out the charter purpose. Hence no dedication of the material can be inferred in such a case. In this we perceive how differently the common law itself must view the application of its own rules. The great merit of the common law so often commended by jurists is its plasticity as a system of principles which can be adapted to new conditions in the affairs of men. *Modern inventions and discoveries have so far transcended the conditions of former times that to apply the rule as to a mere trespasser whose entry is a tort pure and simple, to the case of one authorized to enter for a great public purpose merely because of an irregularity, would be as vain as to attempt to dress a full-grown man in the garb of his childhood.*

" This is not a case of a mere trespass by one having no authority to enter, but by one representing the State herself, clothed with the power of eminent domain and having a right to enter and to place these materials on the land for a public use, materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress but his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *nolens volens*, but not so in this case. For though the original entry was a trespass, it is well settled that the company can proceed, in due course of law, to appropriate the land and to reclaim and avail itself of the structures laid thereon (Harrisburg vs. Crangle, 3 W. & S., 460; McClinton vs. R. R. Co., 10 P. F. Smith, 409; Railroad Co. vs. Bursen, 11 *Id.*, 379). And in Harvey vs. Thomas, 10 Watts, 63, it was held that subsequent proceedings to assess compensation was a protection against a recovery of vindictive damages.

"Another evident difference between a mere *tort feasor* and a railroad company is this: The former necessarily attaches his structure to the freehold, for he has no less estate in himself; but the latter can take an easement only and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title and when its proper use of the easement ceases the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have, therefore, these salient features to characterize the case before us, to wit, the right to enter on the land under authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose by a valid proceeding at law notwithstanding the original illegality of the entry. Under the law the owner has his appropriate remedy, his action of ejectment to recover and retain his land and its use until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession and whatever loss has been caused by these illegal acts.

"There are some analogies bearing remotely on the question before us, showing that property is not gained by the owner of land because found upon it. Thus in the case of property carried off by a flood and stranded on the premises of another, the owner may follow it, enter and take it, or if the owner of the land convert it may recover its value (Forster vs. Bridge Co., 4 Harris, 393; Etter vs. Edwards, 4 Watts, 63). And even a sale will not carry unknown secreted valuables (Hutmacher vs. Harris, Admr., 2 Wright, 491).

"But a case bearing a close analogy—indeed, deciding the principle on which this case rests—is Meig's Appeal, 12 P. F. Smith, 28. In the year 1862, the United States, in the prosecution of the war, erected buildings on the public common of York for military barracks and hospitals. After the close of the war, the government was about to remove the material when the borough authorities proceeded to enjoin the removal on the ground that the buildings has been affixed to the realty. In that we said, referring to Hill vs. Sewald,

3 P. F. Smith, 271, that the old notion of a physical attachment had long since been exploded in this State, and that the question of a fixture or not depends on the nature and character of the act by which the structure is put in place; the policy of law connected with its purpose, and the intention of those concerned in the act. This language applies emphatically to the case now under consideration. It was further said the nature and character of the structure are also to be considered. There were not improvements to be made for objects connected with the soil—neither intended to give value to it or to receive value from it; so, precisely, here, the railroad having no connection with the improvement of the land or its uses, 'the act '[says the opinion] is distinguishable from that of an 'ordinary tresspasser. There was no intent to im-'prove the ground or to make it accessory to some 'business or employment. There is not an assertion 'of title in the soil or of an intention to hold adverse 'possession. Indeed, there was not a single element 'in the case which characterizes the act of a *tort feasor* 'who annexes his structures to the freehold, and is, 'therefore, presumed to intend to alter the nature of 'the title into realty, and thereby to make a gift of it 'to the owner of the freehold.' This language strongly characterizes the case before us. Here, as there, the purpose is a public use; there was no intent to hold adversely as a trespasser nor to improve the land, and make it useful and valuable by the erection. The rails and ties were not intended to be attached to the freehold, but were laid down as a part of an easement under a franchise of the State. There was no intent to use the land as an owner would, and no intent to abandon the materials to the use of the owner; but they were subject to a legal proceeding resulting in maintaining both the ownership and use for the charter purpose. We think, therefore, the ownership of the rails, ties, &c., did not vest in the plaintiff in error by the mere trespass in the original entry."

A similar question was before the court of Illinois in Emerson vs. Western Union Railroad Company (75 Ill., 176), where the Racine and Mississippi Railroad Company, fifteen years prior to the commencement of the proceedings, constructed a railroad track upon the

lands of the appellant, and the appellee, its successor, had used this track continuously down to the time of the commencement of these proceedings. On the hearing the appellant insisted that the road having been placed on his land without compensation and condemnation, the materials thereof were *prima facie* part of the realty and he was entitled to their value as part of the damages for taking the lands. This was denied in the supreme court, upon the ground, as stated by McAllister, J., "that the petition alleged the construction of the road without compensation with the permission and consent of the owner. If that were true, the appellant could not be allowed the value of the road as a part of his realty. The question as to the effect of mere silence on the part of the owner having knowledge, or, in other words, implied consent, is not involved."

In Northern Central Railway Company vs. Canton Company of Baltimore (30 Md., 347), the Northern Central Railroad Company, after the year 1855 and before 1859, constructed, at its own expense, a railway track upon the lands of the Canton Company. The route adopted was agreed upon by them and at the time of the construction of the road the Northern Central Railroad had reason to believe it was laying its railroad upon lands over which it had free right of way. In 1859 the Canton Company, as the result of misunderstandings between the companies, revoked the license under which the railway company was in possession of the land. In 1860 it brought two suits, one in ejectment, the other of trespass *quare clausum fregit*. During the pendency of these suits the railway company filed a bill for specific performance and praying for an injunction. The Canton Company had succeeded in having this bill dismissed and recovered

judgment in both actions at law. A subsequent action of ejectment was brought in January, 1865, for the roadbed and a judgment obtained in June following, and possession given under a writ *habere facias possessionem* to the Canton Company. The rails and other materials which formed a part of the railway constructed by the appellant were upon the land at the time and the question arose in this case who was the rightful owner of them. After thus stating the nature of the controversy and the general rule of the common law as to annexation and the exceptions thereto as to trade fixtures, Judge BRENT, delivering the opinion of the court, says:

"We consider the property in dispute in this case as coming within both of these exceptions. The railway of which it formed an important and necessary part cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary business and pursuits of the railway company. It certainly was not necessary to the enjoyment of the freehold or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned, it is not pretended that it would or could have been used by the appellee as a railway. The conclusion cannot be avoided that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. A railway is certainly quite as essential to the trade and business of a railway company as a steam engine and the house which may cover it, or any other fixture, can be to the miller or miner. We do not mean to be understood as denying the doctrine laid down in Farmers' Loan & Trust Company vs. Hendrickson (25 Barbour, 484), cited with approval in 18 M. D., 103, that the roadbed of the railway, the rails fastened to it and the buildings at the depots are real property. *Prima facie*, a house with its foundation planted in the soil is real property, yet, when it is accessory to trade and, in law, a trade fixture, we find all the authorities regard it as personal property. The

same doctrine is applicable to the railway in question. As a general rule it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules that govern other personal property.

"All the surrounding circumstances show that, at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant, with its money and labor, under the reasonable belief that it had the free right of way, and under the license and by the permission of the owner of the soil. It is true this license was not of such a character as made it irrevocable or gave the appellant any sufficient standing in a court of equity to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it before its revocation is to be regarded as legal, and not as the act of a trespasser. The road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management and taken up and replaced such rails and other materials as were necessary in its judgment for the repairs and proper condition of the road.

In Heise & Mifflin vs. Pennsylvania R. R. Co. (12 P. F. Smith, 62 Penn. St., 67), Heise & Mifflin owned a piece of land on the Pennsylvania through which a branch of the Harrisburg Railroad passed with two tracks. This railroad was leased to the Pennsylvania Railroad Company, which located four additional tracks upon the property. Heise & Mifflin prayed for viewers to assess the damages sustained by them under the Pennsylvania statute. The viewers reported a lump sum of $6,000. The railroad company excepted on the ground that it held a portion of the land under divers leases from Heise & Mifflin who received an annual rent from the same. The Court of Common Pleas set aside the report upon an opinion that under

the terms of the leases the railroad company had the privilege to occupy the ground as they had done. The petitioners, Heise & Mifflin, took out a writ of error to the supreme court, where Agnew delivered the opinion. He says :

"Owing to the defective legislation, for such we must call it, in relation of the mode of proceeding to exercise the State's power of eminent domain by this company, it is difficult to determine the rights of the parties. The law makes no provision for the record of the act of the company in taking property either by filing a draft or an instrument of appropriation, defining with precision the extent, boundaries, location and pupose of the property taken. Entry is *in pais* and the surveys appear to be in the keeping of the company only. In the present case the only draft is the one presented to the viewers and returned with their report, and it exhibits with no precision the defined boundaries of the lands taken. The viewers say the draft was furnished by the company. From this draft it would seem to be impossible to determine whether the company intended to exercise the power of the State in taking the whole number of feet (796) or only that part not held under lease– to wit, ninety-six feet; all this is essential to be known. The question of damages depends on the taking, that is to say, the appropriation of the property to railroad purposes. This is a very different thing from the mere sale of the property under a lease of years. There is nothing to prevent a railroad company having title to the use and occupancy of the land under a lease from laying down rails upon it and using them for a track for engines, cars, &c., if not forbidden in the lease, or if waste is not committed by such acts as evidently injure and destroy the soil. But the appropriation of the property for the uses of a railroad under the power granted to take it for such purposes is essentially different from its mere use during the term of the lease. In the latter case no title is acquired to the easement, and the rail must come up before the expiration of the lease; but in the former a perpetual easement or right of way takes place. In one case the rent is all the compensation which the landlord can demand; in the other the owner is entitled to compensation or security for it before his right of property can be invaded."

In Oregon Railway and Navigation Company vs. Mosier (14 Oregon, 519) the railroad company had obtained the right of way over land from the person supposed by it to be the owner, entered upon the land and constructed its road. Afterwards, the true owner being discovered, it brought an action to condemn the lands, and the owner insisted on having the value of the railroad improvements estimated in the assessment of the value of the property. LORD, C. J., delivering the opinion in the Supreme Court, after considering the common-law rule of annexation and the extent to which modern courts were inclined to relax the strict rules of the ancient law upon the subject, proceeds to point out the distinction between the case at bar and ordinary cases of annexation, first with respect to the right of the State to appropriate and to vest such power of eminent domain, or to make its agent for that purpose the railway company. He then proceeds as follows:

"In view of the rights thus delegated by the State to the corporation, the purposes for which they were conferred, the public use for which the land is condemned, the just compensation required to be paid for its appropriation, and the great interest the public has in the successful operation of the road, it seems to us that these are elements which plainly distinguish the acts of a corporation, though technically a trespasser in building its road upon lands without proper authority therefor, from the acts of the common trespasser in affixing chattels to the freehold, and to render inapplicable the strict rule of law which would treat such improvements as fixtures and part of the realty, or to require the law to be administered upon the just and liberal principles of the exceptions to that rule, which would regard such improvements as personalty and exclude them in computing the value of the land. This distinction and its application to the facts here have thus been very clearly stated by BICKNELL, C. J.:

"The duty rested upon the appellee, before the taking and appropriation of the lands, to have caused

in the appointed mode, an ascertainment of the compensation to which the owner was entitled and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful; no title to them was acquired and the title of the owner was not divested. Neglect of the duty, wrongful entry and possession, does not preclude the appellee from resorting subsequently to appropriate proceedings for the acquisition of the lands, and, of consequence, of availing itself of all the structures it may have placed thereon (Justice v. N. V. R. R. Co., 87 Pa. St., 28; Secombe v. R. R. Co., 23 Wall., 108). Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possesssion rightful, and by which the title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser the proprietor can keep the lands and keeping them hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of or title to the lands. There is also another distinguishing fact: The structures of the appellee were dedicated, not to the use and enjoyment of the freeholder, but to public use which are the consideration for the grant to the appellee for the corporate franchise and of the right in the exercise of these franchises to take and appropriate private property. These elements of the case distinguish it from that of the trespasser entering upon land and affixing chattels to the freehold for his use and enjoyment which he must intend to convert into realty, and which, following the title of the soil as one of its incidents, passed to the proprietor."

Jones vs. N. O. & S. R. R. Co., 70 Ala., 272.

"Equally to the point is the language of AGNEW, J." (quoting extract from opinion already cited, *ante*, and further citing Justice v. Ry. Co., 87 Pa. St., 28; See, also, Toledo, &c., R. R. Co. v. Dunlap, 47 Mich., 456; Lyon v. Ry. Co., 42 Wis., 538; Daniels v. Ry. Co., 41 Iowa, 52).

To the same general effect see case of Moore vs. Vallentine, 77 N. C., 188; Aspinall vs. Chicago & N.

W. R. Co., 41 Wis., 474; California and Pacific R. R. Co. vs. Armstrong, 7 Am. & Eng. Ry. Cas., 259; North Hudson Ry. Co. vs. Booraem, 14 Am. Railway Report, 202; see, also, Central Branch R. R. Co. vs. Fritz, 20 Kansas, 430; also Lyon vs. Green Bay & M. Ry. Co., 15 Am. Ry. Reports, 91.

III.

The rights of the telegraph company could not be terminated by a foreclosure to which it was not a party.

Long before the making of this contract, the telegraph company had duly filed with the Postmaster-General its acceptance of the provisions of this act of Congress, and therefore was entitled to all the privileges and powers conferred by the act of July 24th, 1866. It was therefore an agency of the United States, empowered on the 25th of September, 1890, to construct, maintain and operate, as such agency of the general government, telegraph lines along every railroad in the United States, because all railroads, by act of Congress, are post-roads (Rev. Stat., Sec. 3964; 17 Stat., 301, Sec. 201).

Under the construction of the act of July 24, 1866, in Pensacola Telegraph Co. vs. Western Union Telegraph Co. (96 U. S., 1), it was not possible for any State to prohibit the complainant from constructing lines of telegraph along any railroad within its borders; the only limitation upon its power thus to construct lines of telegraph was the requirement that in

some way it should have acquired the right of any private proprietor whose property it was compelled to use or occupy for such construction.

By the contract of September 25, 1890, it obtained of the Frankfort and Southeastern Railroad Company all which it needed under the act of July 24th, 1866, to enable it fully to construct, equip and maintain a telegraph line along that company's railroad, and thereafter, over that line, to do for the general government, and for private individuals as an agency of interstate commerce, all that its legal obligations required it to do. The grants in this contract in connection with this Act of Congress made the right of the Telegraph Company to the use of the right of way of the Railroad Company for its poles and wires complete. The fact that, as a part of the construction of this line, and in connection with the construction, it had made certain provisions for a division of the use of the line when constructed, and as to how the line should be operated after construction, and as to how the cost of repair, maintenance and reconstruction should be borne, in no way limited or qualified its inherent rights and duties as an agency of the United States Government, having a right to maintain this line, and to operate, and maintain it thereafter along and upon this line of railway.

Did the fact that there was at the time this contract was made, on the 25th of September, 1890, a mortgage existing upon that property, prevent the Frankfort and Southeastern Railroad Company from granting a right of way to this agency of the United States Government, and did it prevent the Western Union Telegraph Company, as such agency, from receiving such grant, with all the rights and benefits that result therefrom, as

to the maintenance and operation of a telegraph line? Does the fact of the existence of such mortgage enable the mortgagee, or the purchaser under foreclosure sale of such mortgage in a suit to which the Telegraph Company was *not a party*, to terminate the right granted by the contract of the 25th of September, or does the right granted by the contract, pass to the telegraph company, burdened simply with the mortgage upon that which is granted?

As we understand from the Record (pp. 36–40, *et seq.*), the Circuit Cort of Appeals affirms the decision of the Circuit Court on the ground that "the entry of the mortgagee or its grantee into possession would have avoided all the telegraph company's rights, and that its alleged easement granted for 25 years would be at an end. The grantee of the easement for 25 years certainly stands upon no higher ground than the lessee for such a term. Indeed his possession is not so good in this case" (Record, p. 40). Again the Circuit Court of Appeals say, "It is, however, well settled that no contract of lease or otherwise which the mortgagor may make with respect to the land either enures to the benefit of the mortgagee or his binding on him. There is in such case no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either, and the entry of the mortgagee into possession under the mortgage merely avoids the lease, and releases the lessee from any obligation." Citing two cases (Record, p. 46).

The opinion thus assumes that the contract of September 25, 1890, is either a lease for 25 years of the mortgagor and subject to all the technical rules and principles applicable to leases or that it confers no greater rights than a lease. Indeed, the court says

that the position of the Western Union Telegraph Company under this contract is not as good as that of a lessee. We deny fundamentally and *in toto* that this is a correct construction of the contract of September 25, 1890, or that the principle is sound that "no contract of lease *or otherwise* which a mortgagor may make with respect to the land either enures to the benefit of the mortgagee or is binding on him."

Let us put several cases to illustrate and test the doctrine of the court.

(a) Suppose the same contract which was entered into September 25, 1890, had been entered into between the same parties—to wit, the Frankfort and Southeastern Railroad Company—prior to the execution of the mortgage which was afterwards foreclosed, and the telegraph line had been constructed under that contract also prior to the foreclosure, and the Telegraph Company had been in the possession and the use and enjoyment of the line so constructed. If the opinion of the Circuit Court of appeals is correct, that this is a mere personal contract and confers no right or interest in the land, it would logically result that in that case the foreclosure of the subsequent mortgage would cut off the rights of the Telegraph Company. Can this be the law?

(b) Suppose, after the execution of this mortgage by the Frankfort and Southeastern Railroad Company, The Western Union had applied to the said Railway Company for the privilege of constructing upon its right of way a telegraph line and the Railway Company had executed a grant of the privilege or right to the Telegraph Company to construct and operate a telegraph line upon the right of way of the Railway

Company for a period of 25 years or longer, and the Telegraph Company had accordingly entered into possession and constructed the line, is it to be claimed that in that event the foreclosure of the prior mortgage would cut off the rights of the Telegraph Company if it were not a party to the proceeding? To hold this would be to hold that a prior mortgagor can cut off the rights of a subsequent grantee of rights in the premises without that subsequent grantee's being a party to the foreclosure suit. This, we submit, cannot be the law.

(c) Suppose, instead of making the contract of September 25, 1890, in the form it was made, the Railway Company had made a subsequent mortgage to the Western Union Telegraph Company, to secure any covenant or promise. Of course the Western Union Telegraph Company would be a necessary party to any foreclosure suit or its rights under its mortgage would be unaffected.

Our contention is that this contract grants a right of way just as effectually as if it had been contained in a formal instrument granting to the Telegraph Company the right and privilege to erect and maintain a line of telegraph which the company had on the faith of the instrument erected and constructed. Its rights in a court of law, certainly in a court of equity, are just as effectually secured as if they had been conferred by a formal deed.

Our contention, therefore, is, that this contract is not a mere lease, and is not subject to the rules or principles applicable to leases; but that it is a grant of rights in, to and over the right of way of the Railway Company, which, we claim for the reasons given in a subsequent part of this argument, are in perpetuity.

But for all the purposes of this case it is sufficient to say that it was a grant for 25 years. The right of the grantee cannot be cut off to use and enjoy its telegraph line thus constructed, at least during the period of 25 years, by a foreclosure of a prior mortgage unless the Telegraph Company is a party to such foreclosure.

Let us test the question further by supposing that instead of making the agreement the telegraph company had condemned the right to construct its telegraph line upon and along this railroad, without making the mortgagee a party to the appropriation proceedings, what then would be the trights of the parties. Would its rights terminate on heconclusion of the foreclosure proceedings, to which it had not been made a party ?

Under the law of Michigan, as settled by its courts, if the telegraph company at the time of making this contract had instituted a condemnation suit to condemn this right of way, it would not have been necessary to make this mortgagee a party to the condemnation proceedings. In the case of Grand Rapids vs. Grand Rapids and Indiana Railroad Co. (58 Mich., 641) an attempt was made by the City of Grand Rapids to open a street across the property of the defendant railway company. The railway company objected, and gave evidence of a trust mortgage of all its road, property and franchises to secure the payment of bonds, but which reserved to the railway company the ordinary control of its affairs until dispossessed, and claimed that the trustees under this mortgage were necessary parties to the proceeding to condemn this right of way. This contention was overruled by the Supreme Court in the case above cited. How does the status of the telegraph company

differ from its position, if it had condemned a right of way, without making the mortgagee a party to the proceeding?

The Telegraph Company, in the case at bar, came into a court of equity to sustain its rights of property, and the defendant also came into court and filed its cross-bill. The rights of the parties must, therefore, be judged upon equitable considerations. The defendant stands as the successor in title to a mortgagee of the Frankfort and Southeastern Railroad Company, which latter company entered into a contract granting a right of way and other privileges to the telegraph company along the line of railroad, thus subject to mortgage. This mortgage having been foreclosed without the telegraph company having been a party to the proceedings in foreclosure, the question arises, What are the respective rights of the parties in and to this railroad property? The telegraph company has duly acquired a right of way for its telegraph line, with the right to maintain it, so far as the Frankfort and Southeastern Railroad Company could grant it. The transfer to the Western Union Telegraph Company of the right of way, was subject to the prior mortgage of the Frankfort and Southeastern Railroad Company upon the right of way granted.

At the time the contract of September 25, 1890, was made, the mortgage was not in default, and, therefore, the mortgagor, notwithstanding the mortgage, was to be regarded in all respects as the owner, and entitled to deal with the mortgaged property as such owner. (Jones on Mortgages, Secs. 11, 664 and 676). Under the Act of Congress of July 24th, 1866, the railway company was the only one then competent to give the

authority to the telegraph company to enter upon the railway, and build its line there. The contract was executed by both parties under seal, was followed by possession, the expenditure of money, and, therefore, vested in the Western Union Telegraph Company all the rights intended to be secured by the contract, subject only to the prior mortgage of March, 1889.

The contract makes a present grant of a right of way to the telegraph company. This right of way thus granted was the grant of an easement, an interest in the realty, the consideration for which was the benefits to the railroad company from the use of the telegraph line. The Western Union Telegraph Company shortly after entered into the possession of this easement, and continued in possession, and was in possession at and during the foreclosure. The doctrine of the English law that an easement can only appertain to a dominant estate is not the doctrine of the American courts (Goddard on Easements, pp. 7, 10, 11). The American authorities universally speak of the right of way granted to a railway or telegraph company as an easement, regardless of whether the same is connected with any estate or not (Pierce on American Railways, pp. 157, 158).

This fundamental distinction and provision of this contract was entirely lost sight of by the Courts below in treating the contract of September 25, 1890, as purely a personal covenant between the railway company and the telegraph company. The contract was much more than this. It secured to the telegraph company an interest in the right of way of the railway company. Even if, however, the matter rested not in grant, but in covenant as between the parties, and even if the contract of September 25, 1890, by reason of

not being under seal, or for other causes, was not a sufficient grant of an interest in the realty, still the Western Union Telegraph Company, being in possession, and thus there being notice to the mortgage, the rights of the Western Union Telegraph Company would be protected by a court of equity precisely the same as though the grant was perfect (Goddard on Easements, p. 23).

Hodge vs. Sloan, 107 N. Y., 244, 250, and cases cited.
Western Union Tel. Co. vs. Western & Atlantic R. R. Co., 91 U. S., 283.

When, therefore, this mortgage was foreclosed in 1895, in proceedings to which the telegraph company was not a party, the effect of such foreclosure was simply to make the purchaser at the foreclosure sale, the assignee of the mortgages foreclosed, as between it and the telegraph company.

2d Jones on Mortgages, Sec. 1395.
Freeman on Void Judicial Sales, Sec. 52.
Brobst vs. Brock, 10 Wall., 519.
Johnson vs. Minckler, 10 Johns., 480.
Jackson vs. Bowen, 7 Cowen, 13.
Vanderkemp vs. Shelton, 11 Paige's Ch., 28.
Vroom vs. Detmas, 4 Paige's Ch., 526.
Gage vs. Brewster, 31 N. Y., 218.
Robinson vs. Ryan, 25 N. Y., 320.
Miner vs. Beckman, 50 N. Y., 337.
Gilbert vs. Kelly, Walker's Ch., 494.

In the case of Parker vs. Childs, 25 N. J. Eq., 41, it was directly held that the foreclosure and purchase by the mortgagee of the first mortgage does not extinguish as against the second mortgage the prior mortgage (citing Hunt vs. Hunt, 14 Pickering, 37; Davis vs.

Winn, 2 Allen, 111 ; Lamb vs. Montague, 112 Mass., 352).

When the contract of September 25, 1890, was made, the railroad company was without a telegraph line. A telegraph line, or the use of one, was absolutely essential to the convenient, and even to the successful, operation of a railroad. The railroad company had two courses open to it: (1) It could build a telegraph line at its own sole expense and own it, and when so built it would fall within the security of the prior mortgage as an annexation or by virtue of the clause relating to after-acquired property ; or (2) the railroad company could do as it did—namely, make with the telegraph company an arrangement whereby the telegraph company (it being authorized so to do by its charter, the laws of Michigan, and the Act of Congress of July 24, 1866, *supra*) would build a telegraph line on the right of way of the railroad company *and own such telegraph line*, but under an arrangement to give the railroad company the use of the telegraph line so far as needful for its purposes, under terms and provisions like those of the contract of September 25, 1890, in respect of such use.

This contract, therefore, was a perfectly natural and lawful contract to make. The contract is dual in its character. It first provides for the construction and ownership of a line of telegraph ; such line by the express terms of the contract to be the *property of the telegraph company*. Then it contains numerous provisions with the accompanying details concerning the respective rights of the telegraph company and the railroad company to the use of the telegraph line thus constructed. Put in plain and simple language the grant by the railroad company to the telegraph com-

pany of the right to construct its telegraph line on the right of way of the railroad company as contained in the contract of September 25, 1890, may be thus expressed :

" We, the railroad company, in consideration of the " provisions of this contract for the benefit of the rail- " road company, do hereby grant to you, the telegraph " company, the right of way to construct a telegraph " line in the manner provided in this contract, said " line when constructed to be the property of the tele- " graph company, and for a term of twenty-five years, " and thereafter until the notice provided in the con- " tract shall be given to terminate it, we are to have " certain rights in the use of that telegraph line."

This contract clearly gave to the telegraph company the right to erect and maintain a telegraph line upon the right of way of the railroad company. The right of the telegraph company thus to occupy with its poles and wires the right of way of the railroad company is an easement. Being made by contract under seal it is an easement perfect at law. If, however, it be only an equitable as distinguished from a legal easement, it gives in a court of equity all the rights of a legal easement.

The telegraph company's money brought this telegraph line into existence, or largely so. The telegraph company was in admitted possession, and therefore the mortgagee, when it came to file its foreclosure bill, had full and constructive notice of the rights of the telegraph company. Can any one deny that the railroad company, having thus constructed a line of telegraph, and being in the actual possession and the use of it, would have a right to redeem from the mortgage ? If it had a right to redeem, then it is elementary and fundamental that its rights can not be cut off in any

suit to which it is not a party; and therefore the position above taken in the brief is undoubtedly sound, namely, that any foreclosure of this mortgage to which the telegraph company was not a party is wholly ineffectual as to the telegraph company; does not impair or even affect its rights; and as to the telegraph company such a foreclosure simply makes the purchaser at the foreclosure sale an assignee of the mortgage with no more rights as to the telegraph company than if it had not been foreclosed at all.

Since the railroad company, if the mortgage had not been foreclosed, could not have terminated the rights of the telegraph company, it follows that the purchaser at the foreclosure sale in question cannot do so; and those rights continue, unless the rights of the telegraph company shall be foreclosed in a suit or proceeding to which it is a party.

In the light of these considerations it is insisted that the conclusion arrived at by the Courts below, that the foreclosure of the mortgage terminated all the rights of the telegraph company upon the railway, was erroneous and should be reversed.

Respectfully,

RUSH TAGGART.

JOHN F. DILLON,
GEORGE H. FEARONS,
Of Counsel.

No. 202
Reply Br. of Taggart
Office Supreme Court U. S.
FILED
APR 3 1900
Filed April 3, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 202.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

THE ANN ARBOR RAILROAD COMPANY,
Appellee.

Brief of Appellant in Reply.

RUSH TAGGART,
Solicitor for Appellant.

JOHN F. DILLON,
Of Counsel.

C. O. Burgoyne, Walker and Centre Streets, New York.

IN THE

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

AGAINST

THE ANN ARBOR RAILROAD COMPANY,
Appellee.

The brief for appellee which has come to hand calls for a suggestion respecting the questions open for consideration in this court upon this appeal, and as to the jurisdiction of this court of the questions decided by the Circuit Court of Appeals.

In the brief of the appellee the point is sought to be made that only questions arising upon the Act of Congress of July 24, 1866, is open for this court to consider, and the cases of Horner vs. U. S., 43 U. S., and Stevens vs. Cherokee Nation, 174 U. S., are cited in support of a contention that this court has only jurisdiction to review the Federal questions involved in this case.

It is to be noticed that while this cause could only be removed under the peculiar provisions of the removal

act on the ground of the Federal question involved, because the defendant was a citizen of the State of Michigan, and was sued in that State, yet the cause could have been brought originally in the Federal court of that district and jurisdiction sustained upon two grounds; viz., first, that of diverse citizenship, and, second, that there was involved in the controversy a question arising under the laws of the United States.

This was not done, but the cause was taken into the Federal court, as we have already stated, by reason of the fact that this suit was one arising under the constitution and laws of the United States, and especially under the Act of Congress of July 24th, 1866, now contained in Section 5263 of the Revised Statutes of the United States (Record, p. 12). The cause was tried there and all the questions in it decided by that court. It was retried upon appeal in the United States Circuit Court of Appeals, and from the decision of the United States Circuit Court of Appeals was appealed to this court, and the proposition on the part of the appellee is now urged, that only the Federal question is brought into this court for consideration.

This, we submit, is wholly erroneous. Under Sections 690, 691 and 692, as they existed prior to the passage of the Court of Appeals Act, an appeal would have been from the Circuit Court to this court, and every question in the case would be re-examined by this court upon the appeal.

The limitation that in the examination of a final judgment or decree rendered in any suit in the highest court of the State to the Federal question involved alone shall be considered is clearly required by the provisions of Section 709; and the reasons therefor are stated in the opinion of Mr. Justice MILLER in Murdock vs. City

of Memphis (20 Wallace, 590); but no such limitation applied to a case coming into this court by appeal from the Circuit Court, under the sections above cited whether the jurisdiction of the Circuit Court depended upon diverse citizenship or upon the fact that the case arose under the laws and constitution of the United States.

In this state of the law the Act establishing the Circuit Court of Appeals was passed March 3, 1891 (Sts. at Large, vol. 26, p. 826). Section 5 of that Act defines the cases in which appeal or writ of error may be taken direct from the District Court or Circuit Court to this court. In Section 6, the appellate jurisdiction of the Circuit Court of Appeals is defined, and the cases in which their judgments are made final are then defined:

"And the judgments or decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens, and citizens of the United States or citizens of different States."

It is further provided that:

"In all cases not hereinbefore in this section made final there shall be a right of appeal from, or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs."

This makes perfectly clear the fact that the decree of the Circuit Court of Appeals is only final in the case in which its jurisdiction is dependent entirely upon the opposite parties being aliens and citizens of the United States or citizens of different States, and that the right of appeal referred to in the subsequent part of the section is a right of appeal unaffected by the previous part of the Section making the decree final in certain other contingencies.

The language of the Act would seem not to bear any other construction. The Circuit Court of Appeals may at any time certify to the Supreme Court of the United States any questions or propositions of law, and when so done the Supreme Court may give its instructions on the questions certified to it, or may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. It is also competent in any case to require by *certiorari* any such case to be certified to the Supreme Court, in which case it has the same power to review by appeal or writ of error to the Supreme Court. In each of these cases this court would re-examine the whole case as upon appeal. In face of these clear and explicit provisions of the Court of Appeals Act, we respectfully submit that no supposed analogy between the limitation contained in the statute referred to in Stevens vs. Cherokee Nation, cited *ante*, can control the clear language of this act, under which this appeal was taken. All the questions in this case were passed upon in the Circuit Court and in the Circuit Court of Appeals; all are brought to this court for decision by the appeal which was expressly reserved to the parties as a matter of right in the Court of Appeals Act of March 3, 1891. This act expressly reserved to the parties a right to a "review of the case," not of the federal questions in the case.

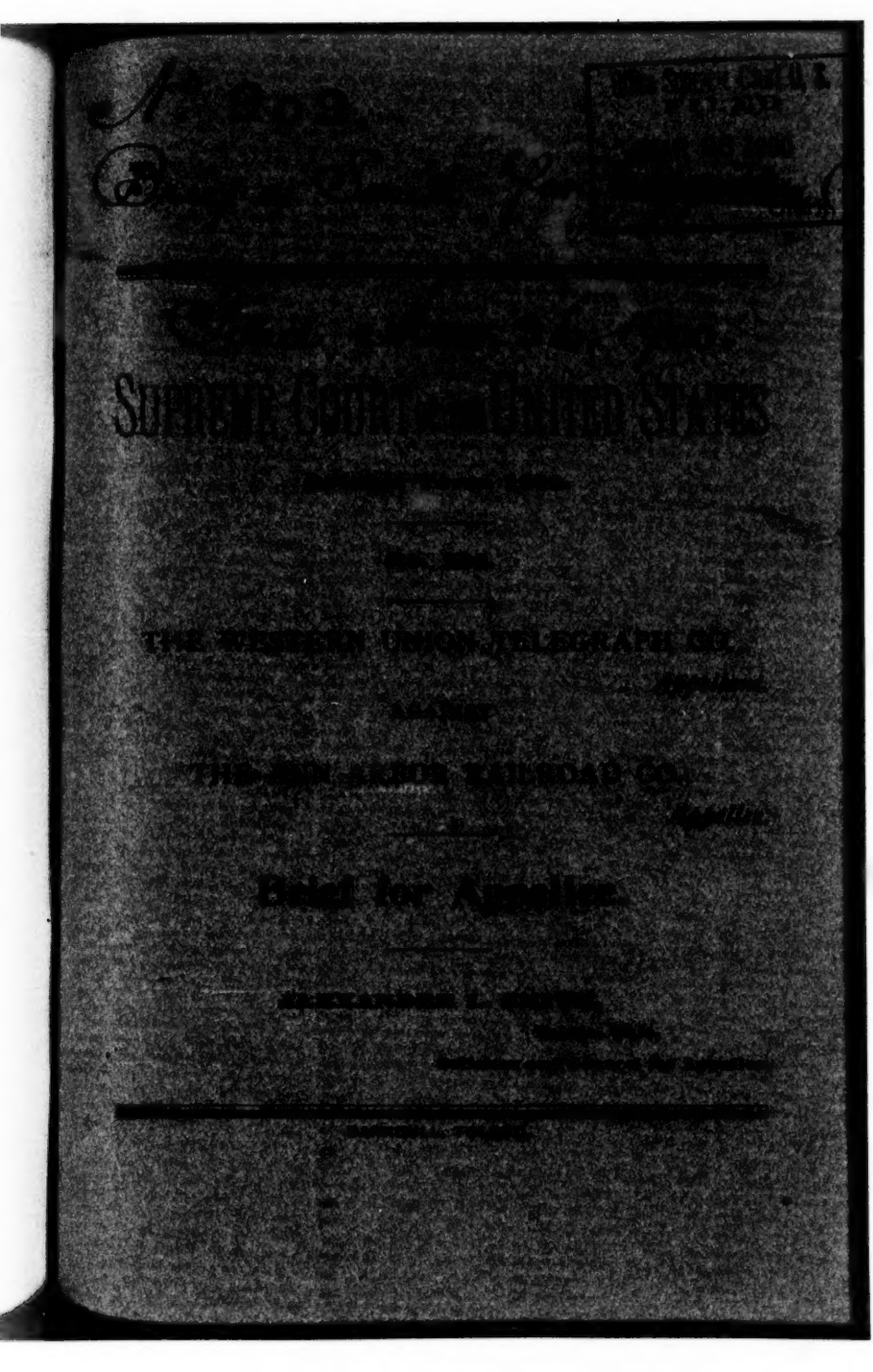
There is a suggestion in the brief of the Appellee that we are limited by our appeal to the question of specific performance of the contract, and that the questions which we ask this court to decide under the Act of 1866 do not arise in the case. We submit that this is too

narrow a view to take of the bill. The bill was drafted under the liberal provisions of the Michigan statute respecting bills in chancery, and is not as full as it would be required to be if originally filed in the Circuit Court of the United States. The seventh paragraph of the bill very clearly avers the right on the part of the telegraph company to maintain the telegraph line along this railroad under the provisions of the statute of the United States. The prayer of the bill is for the right to reconnect its wires to its main line and use said wires, and that the defendant be required to carry out the contract in good faith. In addition, there is a general prayer for other, different and further relief or both as may be agreeable to equity, and under this general prayer and the averment in paragraph 7 we insist that the question is properly and legitimately before the court. At any rate, no question was made in the Circuit Court of Appeals that this question was not properly presented in the case, and the Circuit Court of Appeals decided the question, not upon the technical ground that no such question was made in the case, but that being properly before it on the record the powers of a court of equity were so circumscribed that the relief which the complainant insisted it was entitled to could not be granted by the court (Opinion of TAFT, Record, pp. 43 and 44).

Respectfully submitted,

RUSH TAGGART,
Solicitor for Appellant.

JOHN F. DILLON,
Of Counsel.



IN THE

SUPREME COURT OF THE UNITED STATES

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant.

vs.

THE ANN ARBOR RAILROAD COMPANY,
Appellee.

BRIEF FOR DEFENDANT AND APPELLEE.

I. The bill of complaint in this case was in effect a bill for the specific performance of a contract entered into September 25, 1890, between The Western Union Telegraph Company and The Frankfort & South Eastern Railroad Company, providing for the construction, maintenance and operation of a line of telegraph between Frankfort and Copemish, the termini of the railroad, then operated by the Frankfort & Southeastern Railroad Company. At the time of the execution of this contract there was a mortgage upon the property of the railroad company to secure an issue of bonds amounting to two hundred and thirty-five thousand dollars ($235,000). This mortgage was subsequently (in 1895) foreclosed by judicial proceedings in the Circuit Court of the United States for the Western District of Michigan, Southern Division, and the property was sold at judicial

sale to a representative of the bondholders, who thereupon conveyed the same to the defendant, The Ann Arbor Railroad Company.

The defendant claimed that it was not bound by the contract in question and before taking possession of the railroad property, notified the plaintiff in writing that it was not bound by the contract and would not operate under it. On taking possession of the railroad property the defendant took possession of the telegraph line between Thompsonville (near Copemish) and Frankfort and disconnected it from the lines of the Western Union Telegraph Company. Shortly thereafter the telegraph company established a re-connection by force and filed its bill in this case procuring a preliminary injunction at the time of the beginning of the suit. It was claimed in the original bill that independently of said contract complainant has a right to maintain and operate its line over the property of the railroad company under the provisions of the statute of July 24, 1886. But this statute does not confer any right upon the telegraph company to go on the property of a railroad company except by agreement or condemnation. Indeed Congress could not confer such a right.

See—

Telegraph Co. vs. Telegraph Co., 96 U. S. 1-11-13.

In this case the Court say, speaking of the Act: "It gives no foreign corporation the right to enter upon private property, without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupa-

tion of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Again,—"No question arises as to the authority of Congress to provide for the appropriafion of private property to the uses of the telegraph, for no such attempt has been made * * * If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

It is not, we suppose, now seriously claimed by counsel for appellant that the Telegraph Company has the right, under the statute and independently of the contract, to maintain and operate its telegraph line over the railway Company's property.

But we suggest that *this is the only question open for consideration in this Court.* The case was removed to the Federal from the State Court on the ground that this Federal question was involved. Had the jurisdiction of the Federal Court depended merely on diverse citizenship, the jurisdiction of the Circuit Court of Appeals would have been final. The only authority for invoking the jurisdiction of this Court arises from the fact that the suit involved a Federal question. And we suggest that the appellate jurisdiction of this Court is confined to a consideration and determination of that question.

In the case of Horner vs. United States, No. 2, 143 U. S. Reports, p. 570, it was held that on an appeal from the Circuit Court under that clause of section five of the act of March 3rd, 1891, which gives such appeal "in any case in which the constitutionality of any law of the United States * * * is drawn in question," this

Court acquired jurisdiction of the entire case and all questions involved in it, and not merely of the question of constitutionality of the law. The reason for this holding, as stated by the Court, was that in the clause of the same section which provided for an appeal or writ of error from the Circuit Court to the Supreme Court in cases in which the jurisdiction of the Court below is in issue, it is specifically directed that "the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision." And this Court inferred from the fact that there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in the Supreme Court of appeals or writs of error is given by section five, that it was intended that the jurisciction of this Court should be co-extensive with that of the Court below.

And in the recent case of Stephens vs. Cherokee Nation, 174 U. S., p. 445, the Court say (page 482), referring to the decision in Horner vs. the United States:

"The only ground on which this Court held itself to be authorized to consider the whole merits of the case upon an appeal from the Circuit Court of the United States in a case in which the constitutionality of a law of the United States was involved, under section five of the act of March 3rd, 1891, c. 517, was because of the express limitation in another part of that section of appeals upon the question of jurisdiction; and there is no kindred limitation in the act now before us. Horner vs. United States, 143 U. S., 570-577.".

In the last named case this Court had occasion to consider the extent of its jurisdiction on appeals from the United States Courts in the Indian Territory under

the Indian Appropriation Act of July 1st, 1898, containing this provision :

"Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said Court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage ; and in cases decided subsequent thereto, within sixty days from final judgment ; but in no such case shall the work of the Commission to Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any Court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

And the Court held :

"The distribution of jurisdiction made by the act of March 3rd, 1891, c-517, is to be observed in these cases; but the whole case is not open to adjudication, but the appeal is restricted to the constitutionality and validity of the legislation."

The Court, after reviewing the legislation respecting appeals from the courts in the Indian Territory and comparing the same with the corresponding provisions of the judiciary act of March 3rd, 1891, says :

"And when by the Act of July 1st, 1898, it was provided that 'appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States, * * * under the rules and regulations governing appeals to said Court in other cases,' the legislation taken together, justifies the conclusion that the distribution of jurisdiction made by the act of March 3rd, 1891, was intended to be observed, namely, that cases falling within the classes prescribed in section five should be brought directly to this Court, and all other cases to the Appellate Court, whose decision, as the legislation stands, would in cases of the kind under consideration be final. We do not think, however, that the analogy goes so far, in view of the terms of the act of 1898, that in cases brought here the whole case would be open to adjudication. The matter to be considered on the appeal, like the appeal itself, was evidently intended to be restricted to the constitutionality and validity of the legislation."

Now the appeal in this case is taken under the following clause of section six of the judiciary act of March 3rd, 1891 :

"In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

Certainly this language is no broader than that of the act allowing appeals from the courts of the Indian Territory quoted above, under which it was held, as we have seen, that the jurisdiction of this Court on the appeal was limited to a consideration of the questions

which alone gave the right of appeal. And it will be observed further that there is no clause in section six of the judiciary act which prescribes a limitation upon the questions to be considered by this Court, such as would enable this Court to draw an inference that there was an intention to confer a larger jurisdiction by the clause under which this appeal was taken, as was the case in Horner vs. The United States above cited.

We have not overlooked the last clause of the first paragraph of section six, by which it is provided that this Court, in cases where the jurisdiction of the Court of Appeals is made final, "may require that the whole record and cause may be sent up to it for its consideration, and thereupon it shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." We submit, however, that the construction to be placed upon this clause is that, in the case there referred to, the Supreme Court shall decide the whole case and all the questions involved precisely as if the appeal had been taken from the Circuit Court to the Supreme Court instead of to the Court of Appeals. In other words, that this Court shall, in such cases, decide the whole matter in controversy precisely as it did before the act creating the Court of Appeals was passed. This clause was not intended to enlarge, by implication or inference, the jurisdiction of this Court. The general object of the act was to relieve this Court of a part of its appellate jurisdiction and to substitute therefor the appellate jurisdiction of the Court of Appeals. And on obvious principles, the whole act should be construed with reference to this main, controlling purpose.

American Construction Co. vs. Jacksonville R'y Co., 148 U. S., 372-382.

United States vs. American Bell Telephone Co., 159 U. S., 548-551.

We suggest further that in the case of Horner vs. The United States there was no question as to the distribution of appellate jurisdiction between this Court and the Circuit Court of Appeals. The question there presented arose under the fifth section of the act providing for appeals directly to the Supreme Court from the District Courts, or existing Circuit Courts.

This Court undoubtedly has jurisdiction to determine all questions involved in cases where the federal question exists only because of the character in which the parties sue or are sued. Such are suits brought by or against the United States, officers of the United States, receivers of national banks, corporations created by act of Congress and the like.

But there is a clear distinction between these cases and one in which, like the case at bar, the only federal question is presented by a claim made in the original bill under a specific act of Congress.

This Court in United States vs. American Bell Telephone Co., 159 U. S. 548-5S4, in referring to cases involving infringements of patents and the like say :

" Moreover, in those cases the subject matter is everything in respect of jurisdiction; while here the character in which the plaintiffs sue and the nature of the case are inseparably blended."

There is no such blending in this case. There is nothing in the character of the complainant or defend-

ant, or the claims arising under the contract or the mortgage which presents a federal question. Such question only arises because of the claim of the complainant iu the original bill that it had independently of the contract a right to maintain and operate its telegraph line on the Railway Company's property. This question is of course open for consideration on this appeal. But we submit that if this be determined adversely to the appellant there is an end of the case.

II. Our claim is that this contract is simply a personal contract of the Frankfort & Southeastern Railroad Company and is not binding upon the defendant.

But for the provisions of Article 8 of the contract (see page 7 of the Record) we submit that no one would ever have thought or claimed that this contract conveyed any interest in the land. That article provides as follows:

"The Railroad Company, so far as it legally may, hereby grants and agrees to assure to the Telegraph Company, the exclusive right of way on, along and under the line, lands and bridges of the Railroad Company, and any extensions and branches thereof, for the construction, maintenance, and operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to put up or construct or cause to put up or constructed from time to time such additional lines of poles and wires and underground or other lines as the Telegraph Company may deem expedient, and the Railroad Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railroad Company will not transport

men or material for the construction, maintenance, or operation of a line of poles and wire or wires or underground or other lines in competition with the lines of the Telegraph Company party hereto, except at and for the Railroad Company's regular local rates, nor will it furnish for any competing lines any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations.

Provided always that in protecting and defending the exclusive grants conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, costs, charges and legal expenses incurred therein or thereby."

It is obvious that this paragraph was only inserted for the purpose of creating a monopoly. Except for this, it is entirely unnecessary. Had this paragraph been omitted, there would be a complete valid operating contract. The right on the part of the Telegraph Company to use the Railroad Company's property while the contract is in force arises *ex necessitate*. It inheres in the very nature of the contract itself. The only effect of this article as well as the only purpose of it, is that the Railroad Company will make no similar contract with ano other telegraph company. But such a provision is entirely invalid.

Telegraph Company vs. Telegraph Company; 96 U. S. 1.

Telegraph Company vs. Telegraph Company, 9 Bliss. 72-3.

Telegraph Company vs. Telegraph Company, 23 Fed. Rep. 12.

Telegraph Company vs. Telegraph Company, 19 Fed. Rep. 660.

Merc. Trust Co. vs. Atlantic & Pac. Ry Co, 63 Fed. Rep. 910.

We claim therefore that the contract is to be construed exactly as if this clause had no existence whatever. We have been cited to the case of the Western Union Telegraph Company vs. Burlington & Southwestern Railroad Company, 11 Fed. Rep. page 1.

In that case it was held that similar paragraph in a contract between a railroad company and a telegraph company was void as contrary to public policy, but that the contract was capable of being construed divisibly and the remainder of the contract was valid.

But in this the case at bar the Telegraph Company is seeking to again subdivide this paragraph and in such wise as to give it the benefit of a right of way claimed to be granted thereunder, although it concedes that it can not have the exclusive right of way sought to be obtained ; and this notwithstanding the fact that as we have seen, the whole design of the Telegraph Company by the clause in question, was to procure a monopoly of the telegraph business over the Railroad Company's right of way.

We submit that this prragraph can not be split up in this way. The contract as a whole may be divisible. Paragraph eight may be omitted, but this paragraph is not divisible, and may be rejected as a whole without altering the contract in any essential respect.

III. But aside from the question of the validity of this clause it is clear from the contract taken as a whole that it is simply a personal contract between the parties.

It is an *operating* contract extending over a period of twenty-five years, with many obligations resting on the Railroad Company as well as the Telegraph Company. These mutual obligations as to operation are the essence of the contract, and they are all personal in their nature.

It cannot be claimed that these obligations are in any way binding upon this company e. g. the duty to reconstruct and maintain the poles, to transport free of charge men and materials therefor, to furnish space for batteries free of charge, to allow Telegraph Company to use Railroad Company's wire in case of interruption on the former's wire, to furnish operators, collect tolls, make monthly statements and account for receipts to Telegraph Company, to transport free of charge employes of Telegraph Company, to furnish lights and fuel at stations for accommodation of Telegraph Company, to indemnify Telegraph Company for damage arising from error in transmission of messages, etc. These and corresponding obligations on the part of the Telegraph Company are really the whole of the contract, which as we have said is entirely complete without the eighth article. But these do not create any lien upon this property. The purchaser at judicial sale is not bound by them. The contract is quite similar to that in—*Express Company vs. Railroad Company, 99 U. S. 191*, to which we call the careful attention of the Court. The syllabus is as follows:

"A contract between A, a railroad company, and B, an express company, stipulated that B should lend A

$20,000 to be expended in repairing and equipping its road, and that A should grant to B the necessary privileges and facilities for the transaction of all express business over the road, the sum found to be due A therefor upon monthly settlement of accounts. to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money with interest thereon was not paid, it was to continue in force until payment should be made. After B had advanced the money, and entered upon the performance of the contract, A conveyed all its property, including its franchise, to C, in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C brought a foreclosure suit, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B, the latter, with the consent of the Court, brought its bill in equity for specific performance against him, A and C. *Held* 1, That the receiver is the only necessary party defendant. 2. That the transaction between the companies is not a license, but simply a contract for transportation creating no lien, the specific performance whereof would be a form of satisfaction or payment, which the receiver can not be required to make."

The contract in that case is set out in *extenso* on pp. 192-193-194, and on pages 200 and 201, the Court says:

"There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit bought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither

expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the services sought to be enforced. Both belong to the lienholders, and neither can thus be diverted."

This contract is an *entirety* and if enforced at all must be enforced in all its parts. Indeed that is the prayer of the bill.

If it could be otherwise claimed that there was a substantive grant of an interest in the land, it seems clear that it is only for such length of time as the contract is operative and binding. This is in accord with the language of Article 12, as to the duration of the contract. This is as follows: "The provisions of this agreement shall be and continue in force for and during the term the twenty-five (25) years from the twenty-fifth day of September, 1890; and shall continue after the close of said term until the expiration of one (1) year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same."

Frem the foregoing we think it clear that this contract is not binding upon the present company. It is not claimed that the personal obligations of The Frankfort & Southeastern Railroad Company or its successor, The Toledo, Ann Arbor & North Michigan Railway Company, are as such binding upon the present Company.

It is ~~agreed~~ argued; however, that the entire contract runs

with the land so as to bind the defendant company, and this because the defendant know of the existence of the contract and of the rights claimed by the Telegraph Company under it. If in fact the obligations of the contract are covenants running with the land, the knowledge of the defendant of its existence might be material. If, however, the contract is a personal contract, then defendant is not bound unless it assumed its obligations in some way. But counsel does not point out any of these covenants which is not purely personal in character.

Indeed they are, as we have seen, the whole of the contract. The right of way is simply incidental. As was said by the Circuit Court below in paragraph 5 of the opinion "it (the right of way) has no foundation upon which it could last independently of the personal covenants."

IV. There is no ground for any claim that the conduct of defendant makes the contract binding on it. It repudiated the contract from the outset, and notified the Telegraph Company that it was not bound by it. Its action in disconnecting the wires and taking possession of the line was a distinct disclaimer of obligation and calculated to forestall any claim that it had ratified or adopted the contract. If it exceeded its legal rights in taking possession of personal property of the Telegraph Campany (either purposely or through a mistaken notion that by the foreclosure it had become the owner thereof) it has been and is willing to make reparation. Such possession was very short-lived and of small consequence. The Court will hardly hold that it adopted the contract unless it intended to adopt it or its acts are inconsistent with any other intention. As a matter of fact its intention was exactly the reverse and its acts

were calculated to express its intention to repudiate the obligation. In its cross bill (paragraph 6), the defendant disclaims any interest in the wires and insulators, but claims ownership in the poles (not however under the contract) and expresses its willingness to have an accounting. We do not ask to use any property of the complainant, but are willing to have complainant remove all its property as the Court below decreed it had the right to do.

The case differs from the case of *Western Union Telegraph Company vs Western & Atlantic R. R. Co.* in 91 U. S., 283, in that there the railroad sought to retain the benefits but repudiated the obligations of the contract. In the case at bar we want neither. We ask simply the free use of our own property.

V. Aside from the foregoing, however, we contend that inasmuch as the contract between the Railroad Company and the Telegraph Company was executed after the mortgage of the Railroad Company, all rights of the Telegraph Company under the contract ceased npon the foreclosure of the mortgage, the sale of the property, and the entry of the purchaser into possession. Certain it is that even assuming that the Telegraph Company under the contract was the grantee of an easement in the property, its position is no better than that of a lessee of the mortgagor under a lease executed subsequent to the mortgage, and in such case it seems to be well settled that the rights of the lessee would be extinguished by the foreclosure and sale of the property.

It has been suggested, however, that this rule does not prevail in Michigan, because it is there held that a

mortgage is simply a lien upon the property and it is provided by statute that no action of ejectment shall be maintained by a mortgagee or his assigns or representatives, for the recovery of the mortgaged premises until the title thereto shall have become absolute upon foreclosure of the mortgage. But, as was pointed out by the Circuit Court of Appeals, the only effect of this statute is to take away the remedy of the mortgagee by way of entry or ejectment; it does not affect his rights as against those holding under the mortgagor. Whenever the mortgagee, or his assigns, has acquired lawful possession of the mortgaged premises, either by entry or by foreclosure and sale, the rights of the mortgagor are extinguished. And inasmuch as the right of the grantee of the mortgagor (either a lessee or holder of an inferior easement) is subject to being devested by by the mortgagor's acquiring possession of the mortgaged premises, it follows that the rights of such grantee are extinguished upon the happening of that event. If this be the law, the fact that the Western Union Company was not a party to the foreclosure suit makes no difference so far as the rights of the parties are concerned. Had that company been made a party, it would have been cut off by the judgment in the foreclosure suit; but its possessory rights are just as effectually extinguished by the sale and entry of the purchaser into possession.

It is possible that some right of redemption may exist which was not foreclosed. But this is not a bill to redeem, but one for the specific performance of the contract. In the states of Iowa, California and New York, the relations between mortgagor and mortgagee appear to be substantially the same as in Michigan. Yet in each of those states it has been held that the

rights of a lessee of the mortgagor, holding under grants subsequent to the mortgage, are entirely subordinate to the rights of the mortgagee and his assigns and are extinguished by the foreclosure of the mortgage and sale of the premises.

We cannot do better than quote from the able opinion of the presiding judge of the Circuit Court of Appeals in this case upon this point. See 90 Fed. Rep., pages 384, 385:

"In Iowa by statute, the mortgagor retains the legal title and the right of possession until foreclosure and sale. Code Iowa, 1873, page 357; Jones, Mortgages, section 29. In Downard vs. Groff, 40 Ia., 597, A. sued G, on a covenant of general warranty. G. was the assignee of a mortgage and at foreclosure bought in the property and sold with warranty to A. The breach assigned was that B., the mortgagor, after the execution of the mortgage, had leased the land to one L., and that L., who had not been made a party to the foreclosure proceeding, had refused to yield possession, and had taken the crops growing at the time of the sale. It was held that no breach was shown, because the purchaser had the right to evict L. and to take the emblements.

The Court said: 'It may be conceded that since Leroy, the tenant, was in possession under a lease from the mortgagor, and was not made a party to the foreclosure suit, that he is not bound or affected by the judgment therein. But this fact does not alter the rights of the mortgagee, or of the purchaser under the foreclosure sale, as against such tenant. It only affects the remedy, and defeats the use of the judgment as

evidence. By the lease from Dorstal, the mortgagor, to Leroy, the latter acquired no greater rights in the premises than the mortgagor had. The tenant stands exactly in the situation of the mortgagor. As between the mortgagor and mortgagees, the latter, by the foreclosure and sale, became entitled to the possession of the premises, and to all the crops then growing thereon. The right of the purchaser was not and could not be defeated by reason of the lease, or by the fact that the possession was in, or that the crops were grown by the lessee. The right to the possession, and the right to the growing crops, passed to the purchaser. If the tenant had been made a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but, since he was not made a party thereto, he cannot obtain the remedy except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party. It follows, therefore, that Groff, by his purchase and sheriff's deed, became the absolute owner of the premises, including the crops growing thereon; and by his conveyance he invested the plaintiff herein with that ownership, and she might by proper action, have enforced her rights as such owner against the tenant. Her failure to do so cannot give her any cause of action as against the defendant, the grantor.'

In California the title and right of possession of the mortgagor continues until foreclosure and sale. McMillan vs. Richards, 9 Cal., 365; 1 Jones, Mortg., section 20. In McDermott vs. Burke, 16 Cal., 580, the action was ejectment by the purchaser at a mortgage foreclosure sale against the lessees under a term of five

years, granted by the mortgagor after the execution of the mortgage. Chief Justice Field, who had delivered the opinion in McMillan vs. Richards, *supra*, also delivered the judgment of the Court in this case. He said :

'We are of the opinion that the legal rights of the lessee were extinguished by the proceedings in the foreclosure suit and sale following the decree thereon. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee at the time had notice of the mortgage, either actual or constructive. The interest of the lessee in such case is dependent for its duration, except as limited by the terms of the lease, upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and in this state against the mortgagee ; but with its enforcement the leasehold interest is determined. There is no privity of contract or of estate between the purchaser, the decree of sale and the tenant. The purchaser may therefore treat the tenant as an occupant without right, and maintain ejectment for the premises. He cannot, for the want of such privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, express or implied, is made between them with reference to the occupation. Until then, both are equally free from any contract obligations to each other. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered. The purchaser may prefer to have the possession, and the tenant may also prefer to surrender it. * * * The error of the plaintiff arises from the misapprehension of the rule as to the

parties necessary to the foreclosure of a mortgage. The rule only requires, as parties, those who are beneficially interested in the claim secured or in the estate mortgaged. The tenant is not thus interested in the claim. He is not entitled to its proceeds when collected, or to any portion of the proceeds. Nor is he thus interested in the estate mortgaged ; that is, in the title which is pledged as security. He has not succeeded to such estate or any portion of such estate. He does not stand, therefore, in the position of a purchaser. The estate remains in his lessor. He has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the sale of the premises, or, rather with the deed by which the sale is consummated. The right of the tenant to such possession depends upon that of the lessor, and goes with tt.'

In New York no action of ejectment can be sustained by a mortgagee for the recovery of the mortgaged premises, and the mortgagor has a right to sell or lease subject to the rights of the mortgagee. In Simers vs. Saltus; 3 Denio, 214, the suit was by the mortgagor on a covenant of a lease for rent. The defense was eviction. The facts were that the lessor,being the owner in fee of the land, had given a mortgage upon the same before he made the lease upon which suit was brought, and that the mortgagee had foreclosed the property, and brought it to a sale; that the purchaser had said to the tenant that he might continue to occupy the land, and the contention was that, by such consent, the lessee continued bound under the lease. The court held however, that, by the foreclosure and sale, the lease of the tenant had been extinguished. The Court said: —

'If the mortgagor, subsequent to the mortgage, lease

the premises, the mortgagee cannot distrain or sue for rent, because there is no privity of contract or of estate between the mortgagee and tenant, unless the tenant attorn to the mortgagee after the mortgage has become forfeited, which he may do. * * * After foreclosure and sale of the mortgaged premises, in possession of a lessee of a mortgagor, under a lease subsequent to the mortgage, the lease is considered a wrongdoer, and is not entitled to notice to quit; and against him an action of trespass will lie by the purchaser for taking and carrying away the crops. Lane vs. King, 8 Wend., 584 ' "

It has been suggested that the Court has the power to so frame its decree as in some way to enable the Telegraph Company to effect an equitable condemnation of the property of the Railroad Company, compelling the Railroad Company in the meantime to perform this contract by mandatory injunction. We submit that the Court has no such power. Our attention has been called to the case of McElroy vs. Kansas City, 21 Fed. Rep., 257 and the decision of Circuit Judge Brewer in that case. The complainant in that case was the owner of a lot on the corner of two streets in Kansas City. The grade had been established by the city by ordinance, the carrying into execution of which would leave the lot of the complainant many feet above one of the streets and seriously damage the value of the property. While under the Statutes of Missouri it was provided that private property should not be taken or damaged for public use without just compensation, it appeared that no provision had been made by the legislature by which the amount of damages in such cases could be ascertained, and it was contended by the complainant that the city was powerless to proceed as it

had no statutory power to condemn, and that it only remained for the Court to grant a perpetual injunction. After a consideration of the case, the Court ordered that the defendant be restrained from grading the street upon the filing by the complainant of a bond and stipulation to accept such damages as might be awarded by a board of commissioners appointed by the Court.

We have also cited the Elevated Railway cases decided by the New York Court of Appeals. In these cases the complainants were abutting property owners who sought to have an injunction restraining the operation of the road, and in some of the cases it was held that the Court could suspend the operation of an injunction long enough to permit the Railway Company to condemn and pay for the property interests taken, or damaged, by the construction and operation of the road. It is apparent that these cases have no application to the case at bar. In all of them it will be noticed that it was the aggrieved property owner who was invoking the aid and protection of a Court of Equity and not, as in the case at bar, the party claiming the right to an equitable condemnation. In the present case, the Telegraph Company, having been ousted from possession, reconnected its wires by force and then appealed to a Court of Equity to maintain it in possession by order of injunction, and now suggests that the Court may enable it equitably to appropriate the property. We have seen no case which would warrant any such proceeding. In the Kansas case Judge Brewer emphasized the principle that in considering an application for an injunction, the Court would weigh the respective interests of the parties and the injuries which might result from the granting of the injunction and if it was apparent that the complainant could be fully protected in some other way, and

especially if the public would be greatly inconvenienced by the injunction prayed for, the Court might withhold the relief.

The Court also laid stress upon the fact that the city had an ultimate right to grade the street, and was only prevented from ascertaining and paying damages (the condition of the exercise of the right) by the fact that no tribunal had been created for that purpose. It seems very clear to us that it would be a perversion of the principles enunciated in that case to apply them to the case at bar. Here the Telegraph Company has no ultimate right, nor any right, to occupy the railway property without the consent of the Railroad Company. Its action in forcibly taking possession was wrongful and it is in no position to appeal to a Court to maintain this wrongful possession. The suggestion that it is willing to pay comes too late—the bill was evidently not framed on any such theory. As we said at the outset, it is in effect a bill for the specific performance of the contract, based upon the mistaken theory that it is binding upon the defendant.

We submit, therefore, that the decrees of the Court below were right and should be affirmed.

VI. Since the foregoing was prepared we have received a copy of appellant's brief. Counsel are in error in stating (page 7, brief) that the Circuit Court of Appeals affirmed the decree of the Circuit Court "on the same ground."

In fact, the decrees of the two courts below were based on different grounds. The Circuit Court was of opinion that the easement (if any there was) of the Tele-

graph Company "was necessarily incident to the personal covenants, but it has no foundation upon which it could last independently of the personal covenants." (Record, p. 29.)

This, of course, was quite independent of the prior mortgage and the rights of defendant as purchaser under the mortgage. The Circuit Court of Appeals, on the other hand, without undertaking to decide whether or not the contract created an interest in the land or was purely personal in its character, held that in any event the rights of the Telegraph Company terminated with the foreclosure and sale and entry of purchaser into possession. (Record, pp. 39 *et seq.*)

The case of the City of Los Angeles vs. Los Angeles City Water Company, 124 Cal., 368, does not help the appellant. There the City and the Water Company were the original parties to the contract and bound by its terms. The city had agreed to *pay for* the improvement at the end of the term. It refused to perform this obligation but came into court with an application for an injunction and receiver to prevent the Water Company from receiving payment of water rates after the expiration of the period fixed by the contract. The application was rightfully refused.

In the case at bar, the Railroad Company is under no obligation to pay for the improvements. It does not want them and is willing and anxious to have the Telegraph Company remove its property.

Counsel say in their brief (pps. 17, 18):—

"If the eighth clause had never been in the contract,

still, we insist that the remaining provisions of the contract would clearly evidence an intent to grant a right to construct a telegraph line along the railway, and would constitute the grant of such right. The eighth clause of the contract is not so much a grant of the right of way along the railroad, (for this is necessarily implied in the remaining provisions for the construction, maintenance and operation of ths telegraph line), but it is a specific stipulation in the nature of a regulation of the right of way granted — a limitation on the power of the railway company to grant to other companies a similar right. As we have said, if this clause be entirely stricken from the contract, a right of way along the railway is necessarily implied from the other provisions, and the express purpose of the parties in entering into the contract. The Circuit Court held that the grant of right of way to the Telegraph Company was merely incidental to the mere personal agreement of the parties, and to enable that personal agreement to be carried out."

This, we think, is a fatal though a forced concession. For without the eighth clause this contract is obviously purely personal and the conclusion of the Circuit Court was clearly correct. (p. 18 of brief.)

Nor does the reference to the Michigan statute relating to telegraph companies help out the case. That statute does not confer the right of eminent domain, and if it did it applies only to Michigan corporations. The most that can be said is that the Telegraph Company had a right to contract with the Railroad Company for the use of the latter's property, and the State of Michigan could not prevent its so doing.

Nor was there anything preventing it getting the consent of the mortgagee to the contract in such wise as to have protected its rights in the event of foreclosure and sale.

The case of Phillips vs. Thompson, 1 Johns, Ch. 131, was a case where plaintiff had allowed county commissioners to take possession of his property for public uses under an oral contract for compensation. He filed a bill for specific performance. In this he failed because the contract was void under the statute of frauds. Yet the Court retained his bill and awarded an issue to assess damages, because he was clearly entitled to compensation and his remedy at law was doubtful or inadequate.

But there the possession was by agreement with the plaintiff. We have no contract with the Telegraph Company. In North Hudson R. R. Co. vs. Boraem, 28 N. J. Eq., 450, the suit was brought to foreclose a purchase money mortgage. A railroad company which had entered into possession of part of the mortgaged premises by consent of the mortgagor, under an agreement to purchase, was made a party. It had the right to condemn. And the Court held that the value of the land appropriated by it could be ascertained by proceedings to condemn or by reference to a master.

But the case turned, as did the other cases cited by counsel on this point, upon the question whether the value of improvements placed upon the land by a railroad company, which had entered without any contract or any contract binding upon the mortgagee, could be considered in estimating the compensation to be paid by the railroad company.

With all deference to distinguished counsel for the

Telegraph Company, it seems to us that these cases do not reach the point in this case. Their client made a contract with The Frankfort and South Eastern Railroad Compay, under which it obtained a temporary right to occupy the property of that Company. That property was subject to a mortgage of which the Telegraph Company had notice. The Telegraph Company did not obtain the consent of the mortgagee, nor has it any contract or agreement with the purchaser. It has no power to condemn and no right to occupy save by agreement with the owner. Being properly ousted, it regained possession by force and retains it by grace of a Court of Equity, and now seeks to compel the present Railroad Company to carry out a contract it neither made nor assumed, and against its will.

No appeal to public interests can warrant such an invasion of private rights.

Respectfully submitted,

ALEXANDER L. SMITH,
Solicitor and Counsel for Appellee.

WESTERN UNION TELEGRAPH COMPANY *v.* ANN ARBOR RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 202. Argued and submitted March 19, 20, 1900. — Decided May 21, 1900.

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution and laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground.

THIS was a bill filed in the Circuit Court of Benzie County, Michigan, by the Western Union Telegraph Company against the Ann Arbor Railroad Company, to restrain defendant from interfering with the rights of complainant in a certain telegraph line along defendant's railroad. The bill stated the Western Union Telegraph Company to be "a corporation organized and existing under the laws of the State of New York, and a citizen of the said State of New York," and the Ann Arbor Railroad Company to be "a corporation organized and existing under

the laws of the State of Michigan and a citizen of said State of Michigan." The bill alleged that on the 25th day of September, 1890, the Frankfort and South Eastern Railroad Company, a corporation of the State of Michigan, owned and operated a railroad from Frankfort to near Copemish, Michigan; that on that day complainant entered into a contract with the Frankfort and South Eastern Railroad Company for the construction and maintenance of a telegraph line along the entire length of its road; that in pursuance of the contract and in May, June and July, 1891, complainant built the telegraph lines provided for therein; that one wire was erected for the joint use of the railroad company and complainant, and a loop to Frankfort and back was put on the poles for the exclusive use of complainant. It was further alleged that the railroad of the Frankfort and South Eastern Railroad Company was sold some time in May, 1892, and transferred to the Toledo, Ann Arbor and North Michigan Railroad Company, a corporation organized and existing under the laws of the State of Michigan; that afterwards said last-mentioned company mortgaged their entire railroad to the Farmers' Loan and Trust Company as trustee, and said mortgage being in default a bill was filed to foreclose it in September, 1893, in the Circuit Court of the United States for the Northern District of Michigan, to which foreclosure suit complainant was not a party; that the whole road was sold under order of court and conveyed to the Ann Arbor Railroad Company, and the sale and conveyance were confirmed; that the last-mentioned company now claimed to be in possession and operating the road formerly known as the Frankfort and South Eastern Railroad. And further, that the Ann Arbor Railroad Company purchased the road with full knowledge of complainant's rights, but that it insisted that it was not bound by the contract made with the Frankfort and South Eastern Railroad Company, and had given complainant written notice to that effect.

The sixth and seventh paragraphs of the bill were as follows:

"6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster General its accept-

ance of the provisions of the act of the United States, passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort and South Eastern Railroad Company are binding on said Ann Arbor Company, and that independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern Railroad under the provisions of the statute of the United States."

It was further averred that about October 1, 1895, the Ann Arbor Railroad Company took possession of complainant's wires between Thompsonville, near Copemish, and Frankfort, and cut off their connection with its other wires, and deprived complainant of telegraphic connection with Frankfort; that the value of the telegraph lines was at least the sum of $3000, and the damages arising through loss of business large but incapable of accurate calculation; that October 14, 1895, complainant reconnected the telegraph lines running from Thompsonville to Frankfort, and so again opened telegraphic communication with the latter place, and was now in full possession and use of said lines; but that complainant was justly apprehensive that, unless restrained by injunction, defendant would again seize said telegraph lines and deprive complainant of their use.

The prayer was for process and answer, "and that an injunction both preliminary and final may be issued out of and under the seal of this court, commanding the said Ann Arbor Railroad Company and all its officers and agents to absolutely desist and refrain from in any way interfering with the rights of complainant, as alleged in this bill, in the telegraph wires and poles running from Thompsonville to Frankfort, or its possession of the same, and that said defendant allow said complainant to reconnect said wires to its main line on the Chicago and West Michigan Railroad, and to use said wires for its telegraph business in the same way as it was accustomed to use them before its rights were disturbed by said defendant, and that defendant be required to carry out said contract in good faith and for such other and further or different relief, or both, as may be agreeable to equity and good conscience."

Defendant filed its petition and bond for the removal of the

cause into the Circuit Court of the United States for the Eastern District of Michigan, alleging that it was a citizen of the State of Michigan, and that complainant was a citizen of New York, and then stating: "Your petitioner further shows to the court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2000); that this suit is one arising under the Constitution and laws of the United States, and especially under the act of Congress of July 24, 1866, now contained in section 5263 of the Revised Statutes of the United States and the amendments thereto." The cause having been removed, defendant filed an answer and cross-bill, setting up the existence of a mortgage prior to the alleged contract and its foreclosure, and other matters. Certain facts were stipulated, and the cause submitted. The Circuit Court decreed a dismissal of the bill. From this decree an appeal was taken to the Circuit Court of Appeals, and that court affirmed the decree. 61 U. S. App. 741. From the decree of the Circuit Court of Appeals the Western Union Telegraph Company appealed to this court.

Mr. John F. Dillon for appellant. *Mr. Rush Taggart* and *Mr. George H. Fearons* were on his brief.

No appearance for appellee.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The Western Union Telegraph Company might have instituted its suit in the Circuit Court, but it sought the state tribunals as it had the right to do, and the defendant could not remove the case on the ground of diverse citizenship, although that fact existed, because it was itself a resident of the State. Defendant's application to remove, therefore, was based on the averment that the suit arose "under the Constitution and laws of the United States." Whether it did so arise depended on complainant's statement of its own case. *Tennessee* v. *Bank*,

152 U. S. 454. And the sixth and seventh paragraphs of the bill contain all that defendant could have relied on as bringing the case within that category. These paragraphs were to the effect that complainant had accepted the provisions of the act of Congress of July 24, 1866, and that, independent of the contract, it had "a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern Railroad under the provisions of the statute of the United States."

The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by defendant, "and that defendant be required to carry out said contract in good faith," and for general relief.

It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; "but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1. In that case Mr. Chief Justice Waite further said: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination

of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571.

We are unable to perceive that paragraphs sixth and seventh met this requirement, and it does not appear to us that they were intended to do so by the pleader. As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction. But it was argued that by virtue of the statute the telegraph company was possessed of a public character and was discharging public duties, and that although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the Circuit Court should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the court. It is sufficient to say that the bill was not framed in that aspect, and though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. And it is entirely clear that there were no averments in the bill in respect of this contention which would bring the case within the category of cases arising under the Constitution or laws of the United States so that jurisdiction could be held to have rested on that ground.

The result is that the decrees of the Circuit Court of Appeals and of the Circuit Court must be reversed, and the cause be remanded to the latter court with a direction to remand it to the state court, and it is so ordered.